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HOWARD MATTHEW BILFORD, EDUARDO GARCELL, GEORGE LUIS GONZALES, FRANK VINCENT DICAMILLO, ALBERTO ARAUJO, LUIS CARLOS PEREZ, and JEFFREY ELIOT HOWARD,

Appellants,

v.

STATE OF FLORIDA,

Appellee.

On Appeal From The Supreme Court of Florida

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

The question, raised by this Appeal 1/ is whether a state, by statute, may constitutionally employ a scheme of severe, minimum mandatory prison sentences and fines to compel criminal defendants to serve as informants for law enforcement agencies with no coextensive grant of immunity from prosecution for providing incriminatory information.

This Appeal contemplates several additional questions, which, by the synergistic nature of the Statute sought to be reviewed, should be considered by this Court to be one broad question of interrelated parts, as well as separate components to be scrutinized independently.
Those questions are:

1. Whether the Florida Drug Trafficking Law, violates the Due Process Clause of the Fourteenth Amendment, by providing only the prosecuting attorney with unfettered discretion to implement sentence reduction over defendants who have provided "substantial assistance."

2. Whether the Florida Drug Trafficking Law, violates the Equal Protection Clause of the Fourteenth Amendment, where the terms of the "substantial assistance" provision are entirely too vague and subjective to support the post-conviction plea bargaining process they are supposed to enact.

3. Whether the Florida Drug Trafficking Law, which allows the State Attorney to move for a sentence reduction only for those defendants who provide "substantial assistance" and this discriminates against those defendants who under the facts of their case, are unable to provide "substantial assistance", is unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment.

4. Whether the Florida Drug Trafficking Law, which upon conviction imposes a mandatory minimum sentence without parole, and which permits a sentence reduction only if the defendant "provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals," is unconstitutional as a violation of the Fifth Amendment privilege against self-incrimination.

5. Whether the Florida Drug Trafficking Law, through its potential for arbitrary, punitive and/or discriminatory application in the reduction and suspension of sentences, is unconstitutional as a violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment.

1/ All designations styled (a1, a2, . . .) are to pages in appendix. There are no parties to the proceedings in the court whose judgment is sought to be reviewed other than those contained in the caption of this Appeal, with the single exception of Jim Smith, Attorney General of the State of Florida, The Capital, Tallahassee, Florida 32301.

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QUESTIONS PRESENTED

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components to be scrutinized independently. Those questions are:

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"substantial assistance" and this discriminates against those defendants who under the facts of their case, are unable to provide "substantial assistance", is unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment.

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for arbitrary, punitive and/or discriminatory application in the reduction and suspension of sentences, is unconstitutional as a violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment.

OPINIONS BELOW

The Opinion of the Supreme Court of Florida, which appears at page (1) of the appendix, is reported at 405 So.2d 973 (Fla. 1981). Appellants were appellees in the Florida Supreme Court. Their case was consolidated with another case raising the same issues. The Florida Supreme Court rendered two decisions, which in the aggregate disposed of Appellants' case: State v. Benitez, 395 So.2d 514 (Fla. 1981); and State v. Werner, 402 So.2d 386 (Fla. 1981). Both decisions disposed of the issues raised in this appeal and are reprinted at pages (a-3-a-23) of the appendix. In ruling upon the instant case, the Florida Supreme Court reversed the Order of the Circuit Court, Eleventh Judicial Circuit, Dade County, Florida, entered October 5, 1979, which granted Appellants'

(Defendants, below) Motion to Dismiss Counts I and II of the Information, on the ground that Section 893.135 Florida Statutes, was unconstitutional. The Order of the Circuit Court is reproduced at page (27) of the appendix.

JURISDICTION

The case originated as a criminal prosecution against Appellants in the Circuit Court for Dade County, Florida, charging a violation of Section 893.135 of the Florida Statutes (1979), known as the Drug Trafficking Law. Appellants' motion to dismiss, based inter alia on the constitutional issues raised herein, was granted by the trial court. The State appealed to the Florida Supreme Court which reversed the trial court's order in an opinion dated November 5, 1981. Appellants did not move for rehearing. The opinion became final on December 7, 1981. Notice of Appeal to this Court was filed in the Florida Supreme Court on January 15, 1982. Because Appellants have drawn into question the validity of Section 893.135, Florida Statutes, under the constitution of the United States, both as the statute is applied in the prosecution of Appellants and as to its facial validity, and because the decision below sustained the validity of the statute, this Court has jurisdiction under 28 U.S.C. §1257 (2). Mills v. Alabama, 384 U.S. 214 (1966); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). See also Harris v. Washington, 404 U.S. 55 (1971).

CONSTITUTIONAL PROVISIONS AND STATUTES

The Constitutional provisions and statutes, controlling the disposition of this cause, are lengthy. See Section 893.135, Florida Statute (1979) and Amendments V, VI, VIII, and XIV to the Constitution of the United States. The pertinent text of each, set out verbatim, appears in the appendix at pages (a-56-a-58).

STATEMENT OF CASE

On April 6, 1979, after two days of debate (a-81), Governor Bob Graham celebrated his first legislative conquest by signing into law Florida's reply to the "embarrassing national publicity" concerning the state's estimated $5 billion per year drug-trafficking industry. (a-46). The legal analysis by the legislative staff was less than exhaustive: "The bill appears to be constitutional". (a-90). In the words of the Supreme Court of Florida, the "Legislators knowingly glossed over alleged constitutional defects in the approach that was being developed" to compel drug violators to become informants. State v. Benitez, 395 So.2d 514, 517 (Fla. 1981) (emphasis supplied).

Appellants were charged by information in the Circuit Court for Dade County, Florida, with seven felonies. The first and second counts of the information alleged a violation of Section 893.135(1)(a)(2), Florida Statutes (1979), for the conspiracy and substantive offense of possession and/or sale of cannabis in excess of 2,000 pounds but less than 10,000 pounds (a-59-a-62). The sentence for this offense is a mandatory minimum prison term of five years without parole unless the accused renders substantial assistance in the prosecution of accomplices.

Appellants moved to dismiss this count of the information on numerous state and federal grounds including those urged in this appeal. The trial court sustained the motion and entered an order declaring the statute unconstitutional, (a-27), printed in the appendix hereto. The state appealed this order to the Florida Supreme Court which reversed the trial court on all grounds. The Florida Supreme Court held, inter alia, that the sentencing procedures of the Drug Trafficking Law did not violate the privilege against self-incrimination nor offend due process by permitting the prosecution to exercise the sentencing power.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL ONES WHICH HAVE NOT PREVIOUSLY BEEN CONSIDERED BY THIS COURT.

1. Whether the Florida Drug Trafficking Law,

> violates the Due Process Clause of the Fourteenth Amendment, by providing only the prosecuting attorney with unfettered discretion to implement sentence reduction over defendants who have provided "substantial assistance."

Make no mistake about it. Florida has declared war against drug smugglers. Faced with an enemy both embarrassingly familiar and prominent, the State designed a novel weapon--"Florida's Trafficking Statute." 2/ Engineered in blind haste to be publicized as a statement of the Governor's first decisive victory upon taking office, the trafficking statute makes the traditional arsenal of penalties for drug-law violations pale

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2/ Section 893.135, Florida Statutes (1979), at pages (a-50-a-55) in appendix.

*Now, on the eve of re-election campaign, the Governor no longer embraces this statute as the solution to Florida's drug problem. He has shifted the blame for losing the battle to a lack of federal dollars. (a-247).

by comparison. (a-50). It strikes a hard blow. Hard and foul; reaching into the heart of our Constitution and virtually gutting it of meaning.

Under subsection (3) of the Florida Drug Trafficking Law, the long mandatory sentences otherwise provided for in the act must be imposed unless the prosecutor moves the court for a sentencing reduction on the ground that "substantial assistance" has been rendered. Nothing in the law requires such a motion, however, and there is no provision for judicial review of the prosecutor's discretionary decision not to make the motion. The prosecutor therefore is vested with the discretionary power to withhold any sentencing reduction from the defendant, even if "substantial assistance" has in fact been rendered.

The Florida Supreme Court held in

State v. Benitez, 395 So.2d 514, 519 (Fla. 1981), that this provision did not unlawfully vest the sentencing power in the prosecution since "[t]he ultimate decision on sentencing resides with the judge who must rule on the motion for reduction or suspension of sentence." The court therefore found no constitutional objection in such a procedure. The court, perhaps intentionally, overlooked the statutory truth that the prosecution has no obligation to make such a motion and the decision to do so is totally within his discretion. [3/]

This decision is in direct conflict with the Louisiana Supreme Court's interpretation of a substantially identi-

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[3/] The Florida Supreme Court's approach to this issue was expressly adopted from People v. Eason, 40 N.Y.2d 297,301, 386 N.Y.S.2d 673, 676, 353 N.E.2d 587, 589 (1976), which in similar fashion overlooked the fact that sentencing reduction could be granted only upon prosecutorial recommendation.

cal Louisiana drug trafficking statute.

In State v. LeCompte, ___So2d___, 30 CrL 2225 (La. Nov. 16, 1981), the court was not persuaded by the Benitez opinion that the judiciary's power to sentence following conviction was not invaded by the district attorney's statutory discretion to recommend that the court reduce or suspend the sentence. [4/] The LeCompte court rejected Benitez's reliance on the 1976 decision of the New York Court of Appeal, People v. Eason, 40 N.Y.2d 297, 386 N.Y.S.2d 673, 353 N.E.2d 587 (1976) which had held that "so long as a statute does not wrest from courts the final discretion to impose sentence, it does not infringe upon the constitutional division of responsibilities." 40 N.Y.2d at 301, N.Y.S.2d at 676, 353

[4/] This decision is the rehearing. On the original hearing, the court followed Benitez in its totality.

N.E.2d at 589. The LeCompte court was not persuaded by those courts' reasoning that simply because the trial judge has the final authority to impose a reduced or suspended sentence, if this district attorney in his discretion decides to recommend such, that the judiciary power to sentence is not invaded. 30 CrL at 2226.

The Louisiana Court was instead persuaded by the opinions of Esteybar v. The Municipal Court for the Long Beach Judicial District of Los Angeles County, 5 Cal.3d 119, 485 P.2d 1140, 95 CaL.Rptr. 524 (1971), and People v. The Superior Court of San Mateo County, Lawrence On Tai Ho, Real Party In Interest, 11 Cal.3d 59, 520 P.2d 405, 113 Cal.Rptr.21 (1974). Esteybar involved a statute which allowed for certain offenses to be treated as either a felony or a misdemeanor, however, under the statute, the magistrate could only proceed with the offense as a misdemeanor after obtaining the consent of the prosecuting attorney. The court held that the defendant's entitlement to an independent determination of whether he should be held to answer to a misdemeanor or felony should not be subject to the exercise of judicial discretion that is solely dependent on the executive. 5 Cal. 3d at 126-27, 485 P.2d at 1145, 95 Cal.Rptr. at 528-29. The On Tai Ho case involved a statute which required the consent of a prosecutor before a judge could order a defendant charged with a narcotic offense be diverted into a pre-trial program for treatment and rehabilitation. The court found that the penal provision unconstitutionally infringed on the judiciary's province--that at "whatever stage the intervention occurred, it was an integral step in the process leading to the disposition of the case before the court and therefore constitutes an exercise of judicial authority." 11 Cal. 3d. at 68, 520 P.2d at 411, 113 Cal.Rptr. at 27.

The LeCompte court found that the Louisiana Statute could be reasonably interpreted to not infringe on the judiciary's role. The court held that the statute could be reasonably interpreted as permitting suspension/reduction of sentence in instances other than where the district attorney so moves. 30 CrL at 2226. It must be stressed that the Florida Supreme Court in Benitez and subsequent decisions, such as the instant case, refused to reconsider its interpretation of Section 893.135, Florida Statutes. Instead the court continued in its view that this provision did not unlawfully vest the sentencing power in the prosecution.

This decision is also in direct conflict with a number of decisions of this Court which establish that where a finding of fact must be made in the post-conviction context and where the finding affects a "liberty interest", due process requires at least the opportunity for a hearing before a neutral decision maker.

Morrissey v. Brewer, 408 U.S. 471 (1972), is the landmark decision. The Court there held a state procedure permitting revocation of parole without a hearing and solely on the written report of a parole office to be a violation of due process. The Court first said that Mempha v. Rhay, 389 U.S. 128 (1967), established that sentencing was part of the criminal prosecution requiring the "full panoply of rights due a defendant." 408 U.S. at 480. Since subsection (3) of the Drug Trafficking Law is expressly part of the sentencing process, it is clear that "the full panoply of rights" should apply. Whatever those rights may be, however, it is further clear that any procedural rights required by Morrissey for a parole violation would at a minimum be required for sentencing. The Morrissey Court specified a number of constitutionally required procedures for the parole revocation decision including the opportunity for a hearing before a neutral and detached hearing body. 408 U.S. at 489. The Court further held that even the preliminary decision to seek revocation should be made by "someone not directly involved in the case" and specifically disqualified the prisoner's parole officer since he would not have "complete objectivity". 408 U.S. 485-86.

Morrissey v. Brewer has been followed and applied in numerous other post-conviction settings. Vitek v. Jones, 445 U.S. 480 (1980) (involuntary transfer of a prisoner to a mental hospital); Wolff v. McDonnell, 418 U.S. 539 (1974) (forfeiture of a "good time" for serious misbehavior); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (probation revocation). See also Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979), approving the procedures provided for a parole release decision and noting that somewhat less formality would be required where the decision was standardless, predictive of future behavior, and essentially intuitive, as opposed to a factual determination. Accord; Connecticut Bd. of Pardons v. Dumschat, ___U.S.___, 101 S.Ct. 2460 (1981).

Certainly, the defendant's interest in eligibility for a substantially reduced or suspended sentence under the Drug Trafficking Law far exceeds the importance of the interests recognized in the above decisions. On the other hand, the state has no legitimate interest in denying the defendant at least the minimal protection of an opportunity to present evidence of "substantial assistance" to the trial judge.

Further, subsection (3) of the Drug Trafficking Law in effect establishes a post-conviction finding of fact, i.e., the rendering of "substantial assistance", which substantially ameliorates the sentence. In Specht v. Patterson, 386 U.S. 605 (1967), the Court struck down a Colorado statute providing for a judicial determination of the post-conviction fact that the defendant was a habitual sex offender, because the accused had no right to a hearing with the representation of counsel, no right to present evidence or confront the evidence against him, and no right to written findings providing for meaningful judicial review. Here, not only are no such rights provided, but the decision is in the first instance vested in the prosecutor, not a judge.

In sum, there is a significant body of law from this Court holding that a sentencing decision may not constitutionally be vested in the prosecution. Other states have followed Florida and have recently passed similar or identical legislation. [5] The issue is therefore of growing national importance and should be decided by this Court.

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[5] Code of Alabama, § 20-2-81, enacted in 1980 [identical to Fla. Stat. §893.135(3)]; Louisiana Revised Statutes, §40:967(G)(2), enacted in 1979 [virtually identical to

> (2) Whether the Florida Drug Trafficking Law, violates the Equal Protection Clause of the Fourteenth Amendment, where the terms of the "substantial assistance" provision are entirely too vague and subjective to support the post-conviction plea bargaining process they are supposed to enact.

The "substantial assistance" provision for escaping the mandatory sentences of the Florida Drug Trafficking law suffers from "the vice of vagueness."

Fla.Stat. §893.135(3), but no provision for in camera hearing]. New York Penal Law §65.00(1)(b) (McKinney) is a similar coercive provision built into the general sentencing structure: "The court... may sentence a person to a period of probation upon conviction of a Class A-111 felony if the prosecutor...recommends the...sentence... upon the grounds that such person has or is providing material assistance." As noted supra at p.17, the Louisiana Supreme Court in State v. LeCompte, ___So.2d___, 30 CrL 2225 (La. Nov.16,1981) interpreted this provision as permitting suspension or reduction of the sentence in instances other than where the prosecutor so moves.

See generally, Grayned v. Rockford, 408 U.S. 104, 108-09 (1972); Papachristou v. City of Jacksonville, 405 U.S. 170 (1972); United States v. Evans, 333 U.S. 483 (1943). The provision lacks sufficient definiteness to satisfy the plea bargaining function it is supposed to achieve. This is exacerbated, of course, by the lack of procedural safeguards.

To begin with, the statute provides that both the State Attorney's and the Judge's responsibilities are cast in the discretionary "may." Assuming, however, that binding obligations are placed upon prosecutors by this directory language, how is the performance to be measured? The defendant can attempt to render "substantial assistance" as an informant, but who can say whether or not he has succeeded? Surely not Webster's dictionary. The words place unfettered discretion in the hands of the prosecutor. Given the vagaries of the informer's role and the subjectivity of assessing a concept like "substantial assistance", how can the defendant, the prosecutor or the judge really say that any standard has been met? See, e.g., State v. Hargis, 328 So.2d 479 (Fla. 1st DCA 1976).

Subsection (3) of Section 893.135, Florida Statutes (1979) leaves "the liberty of every man in the hands of every petty officer," see Stanford v. Texas, 379 U.S. 476, 481-82 (1965) (quoting James Otis), while leaving post-conviction "plea bargaining" in an utter morass.

> (3) Whether the Florida
> Drug Trafficking Law,
> which allows the state
> attorney to move for a
> sentence reduction only
> for those defendants who

> provide "substantial assistance" discriminates against these defendants who, under the facts of their case, are unable to provide "substantial assistance", is unconstitutional as a violation of the equal protection clause of the Fourteenth Amendment.

The equal protection guarantee, in the Constitution of the United States, warrants that all individuals are to be accorded fair treatment in the exercise of fundamental rights. This necessitates the elimination of distinctions based on impermissible criteria. When laws touch upon fundamental constitutional values, the express policy of this Court is to follow a "strict form of review" to ensure survival of guarantees that are an integral part of the American system of justice. 6/

6/ United States v. Carolene Products Co., 304 U.S. 144, 152 n. (1938), Skinner v. Oklahoma, 316 U.S. 535 (1942).

Among the fundamental rights, deserving of "strict scrutiny", are the Fifth Amendment's guarantee against self-incrimination, [7/] Sixth Amendment rights in the criminal process, [8/] and the Eighth Amendment's ban on cruel and unusual punishment. [9/]

Pursuant to the "strict scrutiny" standard, courts are obligated to conduct an independent determination of the degree of relationship which discrimination bears to a constitutionally compelling end, rather than merely defer to the decision of another branch of government that created the classifica-

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[7/] Malloy v. Hogan, 378 U.S. 1 (1964); and Griffin v. California, 380 U.S. 609 (1965).

[8/] Gideon v. Wainwright, 372 U.S. 335 (1963) (counsel); In re Oliver, 333 U.S. 257 (1948) (public trial).

[9/] Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947); Robinson v. California, 370 U.S. 660 (1962).

tion. The inquiry is two-fold: First, the government must show a proper purpose a "compelling" or "overriding" end; and, second, that the discrimination is "necessary" to promote that compelling interest.

The Florida Supreme Court in Benitez, supra, failed to do this, notwithstanding the trafficking statute's intentional inroads on several constitutional guarantees embodied in the Bill of Rights--not the least of which is the Fifth Amendment privilege against self-incrimination--the Benitez court applied the more lenient "rational relationship" test. 395 So.2d at 519.

Ignoring, for the moment, that the wrong test was followed, a cursory analysis quickly shows that the statute should not survive any equal protection challenge, regardless of the standard to be applied. The initial inquiry examines the statute's "purpose", which, according to its creators, is undeniably deliberately designed to force criminal defendants to "talk" despite Fifth Amendment guarantees. [10/] Under the "rational relationship" test, this is surely not a "valid" state interest.

The most glaring defect, in equal protection terms, is the trafficking statute's discriminatory impact on those who are simply unable to provide "substantial assistance." [11/] Basic to proper analysis is the axiom that "people of different circumstances should not be

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[10/] Senator Spicola, the sponsor of the bill defined its purpose: "The reason for the bill is to make the penalty stiff enough. . .it's going to make it worth (the defendant's) while to (talk). . ." (a-235)

[11/] This is certainly not the only impermissible classification resulting in discriminatory treatment of a constitution magniture. Consider the following: (1) Defendants treated as if they were the same," [12] particularly when liberty is at stake.

Florida's trafficking provision is "over-inclusive". It treats, in a similar manner, not only those persons whose characteristics similarly relate to the purpose of the law, albeit an improper purpose, but also some additional persons who do not share the distinguishing characteristics. Translated, this

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charged with trafficking who, regardless of motive, "spill the beans", are eligible for sentence mitigation even though strong evidence suggests they have not chosen the road to rehabilitation; whereas others who would otherwise qualify for probation suffer the full inflated term of imprisonment when they refuse to yield their constitutional rights. (2) Trafficking defendants are stripped of any opportunity to rebut the presumption of incorrigibility arising from their silence; whereas others convicted of violent crimes, even capital crimes, are not. (3) Persons convicted of trafficking who acquiesce to the coercion to inform must look to the mercy of the prosecutor for access to mitigation; whereas others enjoy a neutral, detached judicial officer.

[12] Tussman and tenBroek, "The Equal Protection of the Laws", 37 Calif. L.Rev. 341 (1941).

means defendants without the ability to render "substantial assistance" face the same inflated punishment as defendants with the ability to "talk". "Consider: a lowly member of a drug selling enterprise, with no knowledge of the workings of that enterprise and whose sole function is to consummate sales of drugs on the street level, if charged without accomplice or co-defendant, would not be able to provide substantial assistance even if he desired to do so . . . Conversely, the ring leader of such an enterprise, intimately familiar with all the members and workings of that enterprise, would be in a position to offer substantial assistance, and would thus be eligible for a lesser sentence." [13]

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[13] Order of the Honorable Richard S. Hickey, Circuit Court in and for Dade County, Florida, in State v. Jackson, Case No. 79-11741. (a-252).

The net result? Absurd. The least culpable, ordinarily candidates for probation, receive an impenetrable mandatory jail term; while the most culpable get lighter treatment or early release. 14/

As a practical matter, an "irrebuttable presumption" of ability to render substantial assistance is created by the

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14/ The Leopolds and Loebs are given leniency, and not made to suffer the whole term of the mandatory minimum.
Florida's trafficking statute is pregnant with discrimination. Discrimination is simply not compatible with the idea of equal protection of the laws. This is also implicit in the ban on "cruel and unusual punishment."
Those who wrote the Eighth Amendment knew what price their forebearers had paid for a system based, not on equal justice, but on discrimination. In those days the target was not "amateurs" as prospects for police informants, but the dissenters who opposed government's recurring efforts to foist a particular religion on the people. One cannot read this history without realizing that the desire for equality was reflected in the ban against "cruel and unusual punishment" contained in the Eighth Amendment.

challenged law. Under the bifurcated sentencing procedure, the defendant simply cannot contradict the presumption since his inability is used to deny him access to the court to explain his failure to furnish information.

This paradox raises a serious question. That is, whether a state can automatically inflict exaggerated penalties upon a defendant whom it presumes has the ability to render "substantial assistance" for mitigation, when the defendant has no ability to deflate the enhanced punishment, by providing information, as well as no opportunity to explain his inability.

> (4) Whether the Florida Drug Trafficking Law, which upon conviction imposes mandatory minimum sentences without parole, and which permits a sentence reduction only if the defendant "provides substantial assistance in the identification,

> arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals" is unconstitutional as a violation of the Fifth Amendment privilege against self-incrimination.

Under subsection (3) of the Florida Drug Trafficking Law, a convicted defendant must receive a specified mandatory sentence without possibility of parole. The defendant may avoid such a sentence only by providing "substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals." In such a case, the mandatory sentence may be reduced or completely suspended. On the face of it, therefore, the law imposes long sentences as a coercive device to compel disclosures from the accused. Further, unlike decisions, where refusal to cooperate with the prosecution is only _one factor_ in the judge's discretionary sentencing decision, here the _only factor_ affecting length of sentence is the cooperation of the accused.

The Florida Supreme Court held that this sentencing scheme did not violate the privilege against self-incrimination. _State v. Benitez_, 395 So.2d 514, 519-20 (Fla. 1981).

The applicability of the privilege against self-incrimination in the sentencing context was recently before this Court in _Roberts v. United States_, 445 U.S. 552 (1980). In that case, the trial court stated at the imposition of sentence that it had considered the defendant's failure to cooperate with the prosecution. The Court held it was not improper, under generally accepted principles of sentencing, to consider lack of cooperation as bearing on the need for rehabilitation. The petitioner also claimed, for the first time on appeal, that judicial consideration of the lack of cooperation violated his privilege against self-incrimination. The Court responded that, "[t]hese arguments would have merited serious consideration if they had been presented properly to the sentencing judge." 445 U.S. at 559. The Court refused to consider the claim on that basis.

The recognition in Roberts that the self-incrimination claim would have merited serious consideration was based on supporting decisions in the federal courts of appeal. In United States v. Garcia, 544 F.2d 681, 684-86 (3d Cir. 1976), the Court squarely held that requiring defendants to cooperate in the identification and prosecution of accomplices violated the privilege. The Fifth Circuit has reached the same conclusion in a number of decisions. United States v. Wright, 533 F.2d 214, 215-17 (5th Cir. 1976); United States v. Rogers, 504 F.2d 1079, 1084-85 (5th Cir. 1974); United States v. Acosta, 501 F.2d 1330, 1337-38 (5th Cir. 1974), dissenting opinion of Judge Gee, adopted en banc, 509 F.2d 539 (5th Cir. 1975). 15/

The Florida Supreme Court's decision

15/ See also United States v. Rodriguez, 498 F.2d 302 (5th Cir. 1974); and Thomas v. United States, 368 F.2d 941 (5th Cir. 1966), finding a violation of the privilege against self-incrimination where the trial court sentenced more harshly because the accused refused to confess his guilt after conviction.

in this case is in direct conflict with these decisions. Indeed, the sentencing structure of the Florida Drug Trafficking Law presents the self-incrimination issue in its most pure form since under its terms the disclosures of the accused are the only factors affecting sentencing lenity. In the above federal decision, on the other hand, non-cooperation was just one factor in the whole complex of variables affecting the length of sentence. [16]

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[16] The First and Second Circuits have held that the sentencing judge may state that he has taken into consideration the defendant's noncooperation so long as the judge gives consideration to all factors bearing on the need for rehabilitation and does not _punish_ the accused for remaining silent. _United States v. Bradford_, 645 F.2d 115 (2d Cir. 1981); _United States v. Barnes_, 604 F.2d 121 (2d Cir. 1979); _United States v. Miller_, 589 F.2d 1117 (1st Cir. 1978). A contrary result was reached, however, where non-cooperation was the sole basis for enhanced punishment, _United States v. Ramos_, 572 F.2d 360 (2d Cir. 1978). Hence, the Florida Supreme Court's decision is also directly in conflict with this line of authority.

Second, if the privilege against self-incrimination applies in the sentencing context, then the Florida Supreme Court's decision is in direct conflict with a number of this Court's decisions determining the applicability and scope of the privilege. Just last term, and after the Benitez decision was handed down, this Court unequivocally held that the privilege applies at sentencing. Estelle v. Smith, ___U.S.___, 101 S.Ct. 1866, 1872-73, (1981). Given that holding, it remains to be determined whether the sentencing lenity promised by the Drug Trafficking Law is sufficiently compulsive and whether the required disclosures involve a sufficient risk of incrimination to invoke the privilege. The decisions of this Court are clear on both points.

The compulsion of the Drug Trafficking Law is the imposition of mandatory sentences without parole of up to twenty-five years in prison. [17/] If "substantial assistance" is rendered, however, such sentence may be reduced or totally suspended. These sentencing differentials are obviously compelling, and the Court has held that penalties of an economic nature significantly less coercive than incarcerative sentences were sufficient to trigger the privilege. Lefkowitz v. Cunningham, 431 U.S. 801 (1977), and decisions cited therein.

Nor can there be any question but that the disclosures compelled by the

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[17/] Appellants are charged under Section 893.135 (1)(a)(2) with sale and/or possession of more than 2,000 lbs but less than 10,000 lbs of cannabis. If convicted, they will receive a mandatory minimum prison term of five years plus a $50,000.00 fine, unless they render "substantial assistance" to the prosecution.

Drug Trafficking Law involve a sufficient risk of incrimination to invoke the privilege. The statute, for instance, requires the accused to identify accomplices and co-conspirators. This type of disclosure was held protected by the privilege in Malloy v. Hogan, 378 U.S. 1, 12-14 (1964), since the identified accomplice might have information incriminating the defendant in other crimes. Were this not sufficient, it is also clear that disclosures made to state officials without immunity could be the basis for federal prosecution, not only for drug violations under Title 21 of the United States Code, but also for related crimes such as the federal RICO offense, 18 U.S.C. §§1961-68. Abbate v. United States, 359 U.S. 187 (1959). The possibility of incrimination under the laws of a separate soverign is within the protection of the privilege. Marchetti v. United States, 390 U.S. 39, 44-48 (1968).

A final consideration affecting the substantial importance of the self-incrimination issue, as stated supra at page 34, is that a number of other states have recently passed similar or identical legislation which uses the sentencing power to compel cooperation in the identification and prosecution of accomplices. 18/ Besides Florida, two other states have discussed the constitutionality of such a statute, State v. LeCompte, ___So.2d ___, 30 CrL 2225 (La. Nov. 16, 1981) which adopted the Benitez decision

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18/ See footnote 5 for the Alabama and Louisiana statutes. These provisions should also be compared with two other recent enactments: Ohio Revised Code Annotated, §3719.70(B) effective July 1, 1976: "When a person is convicted of any drug abuse offense, the court shall, in determining whether to suspend sentence or place the person on probation, take into consideration whether on this issue, and People v. Eason, 40 NY2d 297, 386 NY 2d 673, 353 NE 2d 587 (1976), where no self-incrimination argument was raised or discussed therein. 19/ This emerging statutory pattern in other jurisdictions shows that the issues raised here present a novel and nationally important question of federal law

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such person has truthfully revealed all information within his knowledge . . . such information shall include . . the identity and whereabouts of accomplices, accessories, aiders, and abettors . . . "; General Statutes of North Carolina, §90-95(h)(5) effective March 1, 1981: "The sentencing judge may . . . impose less than the applicable minimum prison term . . . when such person has, to the best of his knowledge, provided substantial assistance in the identification, arrest or conviction of . . . co- conspirators . . . if the sentencing judge enters in the record a finding that the person sentenced has rendered such substantial assistance."

19/ The long mandatory prison terms provided in the New York law were held not to violate the Cruel and Unusual Punishment Clause in Carmona v. Ward, 576 F.2d 405 (2d Cir. 1978).

which should be decided by this Court. This is especially true where the existence of such statutes undoubtedly operates on a daily basis to coerce disclosures which may be protected by the privilege against self-incrimination.

> (5) Whether the Florida Drug Trafficking Law, through its potential for arbitrary, punitive and/or discriminatory application in the reduction and suspension of sentences, is unconstitutional as a violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment.

Florida's governor and legislators hailed the trafficking statute's mandatory prison terms and fines as the harshest in the nation. (a-81). Backing this claim to Draconian fame--palled, perhaps only by Florida's remarkably long Death Row--was the statute's widely-acknowledged propensity to precipitate murder.

"If he doesn't strike a bargain before he's convicted, he's going to be dead. And we all know that." (a-134) Representative Martinez's foregoing comment upon the fate which confronts people charged with violating the trafficking statute is indicative of opinions voiced by the bill's drafters and the Florida Supreme Court. 20/ No

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20/ See State v. Newman, 405 So.2d 971 (Fla. 1981). The issue before the court in Newman involved the constitutionality of in camera sentencing proceedings for those trafficking defendants who render "substantial assistance." The court upheld the procedure as constitutional stating: "While the presumption in favor of openness is powerful, there are circumstances where closure is justified . . . . Recognizing that the statute with which we are concerned is utilized to combat drug trafficking, and that many persons who aid the authorities in the manner described above (i.e., in accordance with the trafficking statute's "substantial assistance" requirements) would be endangering their lives, we are confident that closure would be justified in a number of the proceedings arising under said law." Id. at 972. (Emphasis supplied).

one doubts that once publicly identified upon arrest, trafficking defendants are marked as potential informants against the financiers of Florida's multi-billion-dollar drug trade. Death, the surest silence, becomes an attendant risk. Those who have spoken of this risk only disagree over the stage of the proceedings at which murder of defendants becomes most probable.

While Rep. Martinez concluded the danger is greatest during the pre-trial stage, one drafter of the statute opined that the likelihood of murder increased post-conviction, as the passage of each mandatory year in prison increased the defendant's desire to utilize the "substantial assistance" escape-valve. Homicide, he said, would be the method preferred by drug-smuggling financiers to "encourage" defendants to silently serve out their time. [21] On the other hand, the Florida Supreme Court recently stated that those defendants who do render "substantial assistance" to law enforcement to escape the statute's mandatory prison terms would likewise be "endangering their lives." Trafficking defendants are caught between the hope of escaping the statute's stiff penalities through conscription into highly-dangerous government service, and the ever-present anxiety of death at the hands of drug financiers. They can only pray for the opportunity to inform against themselves: to plead guilty to a lesser offense. [22]

Notwithstanding this de facto capital punishment aspect of the trafficking statute, its de jure sentencing scheme strikes at the heart of the Eighth Amendment--the "principle of civilized treatment" [23/] heretofore guaranteed to all persons convicted of any crime. The statute codifies the Florida legislature's vow of vengeance against drug traffickers: to punish severely those most easily apprehended. And hope that through the submission such punishment brings, to apprehend those most culpable. Vengeance is distinguishable from civilized forms of justice in that it retaliates with severity often surpassing the original sin that invited retribution. Revenge, simply stated, is oblivious to the culpability of the individual.

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[21] Statement of Jim White, assistant general counsel to the Governor, before the House committee reviewing the trafficking bill. (a-145-146).

[22] State v. Newman, supra, at 972.

The Cruel and Unusual Punishment Clause is violated when the punishment

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[23/] Trop v. Dulles, 356 U.S. 86, 99 (1958).

inflicted is grossly disproportionate to the severity of the crime. See Coker v. Georgia, 433 U.S. 584 (1977); Rummel v. Estelle, 445 U.S. 263, 288-93 (1980) (Powell, J., joined by Brennan, Marshall and Stevens, J.J., dissenting). Disproportionate punishment is inherent in the stated objective of the trafficking statute: to compel defendants to become informants. See Benitez, supra at 517. Indeed, the legislative history shows the lawmakers agreed that the mandatory sentences, which precluded the courts from matching the penality to the offender, were too severe for the crime of trafficking. 24/ Rather, those impene-

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24/ See, e.g., Statement of Rep. Haben (a-96) (statute's penalties are "mandatory" only if defendants refuse to aid law enforcement); Statement of Sen. Myers (a-193) (criticizing stiff mandatory penalties "for what is commonly deemed to be a non-violent crime); Statement of Sen. Spicola (a-200) (whole trable years in prison, without hope of parole, would be the stick used to prod reluctant defendants towards providing "substantial assistance." Freedom would be the carrot dangled from it. And inability, due to lack of knowledge, would be no excuse.

Even if the State could make failure to render "substantial assistance" to law enforcement a crime, the infliction of this statute's mandatory sentences and fines is cruel and excessive punishment

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thrust of the statute is to make defendant inform against drug financiers). Punishment may be disproportionate if it is excessive in comparison to the gravity of the offense, measured by objective standards. In Florida, only capital felonies (mandatory penalty of 25 years in prison without parole when death sentence not imposed) under section 775.082, Fla.Stat., are punished with equal or greater severity than drug trafficking. Even for a life felony or a first degree felony, other than drug trafficking, the defendant remains eligible for probation or parole. But see section 775-.087(2), Fla. Stat. (three-year mandatory prison term for certain offenses committed with a firearm).

for the conduct of standing silent before the State's demands.[25] This proposition gains force by the fact that the statute has proven virtually ineffective in curbing Florida's drug trade, throughout the years it has been enforced. The premise upon which the statute's admittedly severe penalties were based--that defendants must be made informants for the State to capture the financiers--has been proven false by the statute's history, recently admitted by Governor Graham. 26/ When the rationale for the statute's punishment is lost, only the human suffering remains. Furthermore, no real distinction can be drawn between the use of excessive punishment to compel a defendant to inform against others, and to compel him to inform only against himself by pleading guilty to a lesser offense.

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[25] "Section 893.135 essentially enacts a new offense of failing to inform against fellow citizens and other persons, . . . contrary to basic precepts of a free society." Order of Dade County Circuit in the instant case (a-35). Compare Roberts v. United States, 445 U.S. 1 552 (1980). In Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979), this Court reiterated the rule that "given a valid conviction the criminal defendant has been consitutionally deprived of his liberty." Id. at 7. But that "liberty" which a valid conviction extinguishes does not encompass all aspects of individual autonomy. See, e.g., Pell v. Procunier, 417 U.S.817 (1974); Cruz v. Beto, 405 U.S. 319 (1972). Underlying these rights is the right to human dignity preserved by the Eighth Amendment. E.g., Hutto v. Finney,

In determining whether a punishment comports with human dignity protected by the Eighth Amendment, the Court is guided by another principle inherent in the Clause--that the State must not arbitrar-

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437 U.S. 678, 685 (1978); see also Shapiro, Legislating The Control of Behavior Control: Autonomy and The Coercive Use of Organic Therapies," 47 S.Cal. L. R. 237 (1974) (constitution limits state's power to legislatively control human behavior, even when stated objective is rehabilitation of criminal offenders).

26/ See "Graham Attacks Lack of Aid in Drug Fight," The Gainesville Sun (a-247).

ily inflict punishment. [27] This principle derives from a concept of fundamental fairness which is violated when the State, without sound reason, inflicts upon some people a punishment that it does not inflict upon others.

The mandatory penalties of the trafficking statute--being designed to compel "substantial assistance" to law enforcement as an informant, rather than to punish the offense of trafficking--violate this principle on at least three grounds. First, the legislature was after the financiers of the drug industry--not the people tending the fields or caught carrying the goods. But the mandatory penalties strike these "mules" and miss the professed target--the money men. [28]

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[27] See, e.g., Coker v. Georgia, 433 U.S. 584, 596-97 (1977) (punishment rarely imposed may be arbitrarily imposed, contra to the Eight Amendment).

Second, the punishment is arbitrarily inflicted because the trafficking statute takes constitutional rights that it cannot pry loose from some defendants and throws them both into prison. There is no sound reason for imprisoning persons who exercise the rights of the United States Constitution while freeing persons convicted of the same offense who relinquish them.

Human dignity, guaranteed by the Eighth Amendment, a priori demands fair treatment of each individual. Fairness is measured by the treatment of the individual compared to all others similarly situated. Because the trafficking statute, on its face, intentionally denies leniency upon the basis of the prosecutor's arbitrary and unreviewable decision of what constitutes "substantial assistance," the statute--in yet a third respect--violates the prohibition against arbitrary infliction of punishment. [29]

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[28] "Mules" is the term frequently used by Florida legislators during hearings on the trafficking bill to refer to the lowly truck driver, fishing-boat captain and other hired-hands who handle drugs, as contrasted with the king-pins of the drug trade who handle only the money. See, e.g., (a-106, 126, 200).

The Florida Supreme Court in its Benitez decision found that the statute met the requirements of the Eighth Amendment because the mandatory sentences of subsection (1) applied to all persons convicted of trafficking. 395 So.2d at 517-18.

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[29] In addition, federal authorities have rejected the recommendation that mandatory minimum sentences be utilized against drug traffickers, Report of the Comptroller General of the United States, "Bailing and Sentencing Practices Further Weaken Immobilization Efforts," submitted to Congress on 25 October 1979 (reprinted in Contemporary Drug Problems 325, 329 (Fall 1979).

But the power of the State legislature to enact mandatory sentences is not the issue here. The constitutionally repugnant operation of this statute is performed by the inseverable conjunction of subsections (1), (2) and (3). Only subsections (1), (2) and (3), acting together, penalize those who refuse to render "substantial assistance" based upon a valid Fifth Amendment claim against self-incrimination. Only subsections (1), (2) and (3), acting in concert, penalize those who are truly unable to meet the prosecutor's definition of "substantial assistance," a "status" over which they have no control. See Robinson v. California, 370 U.S. 660 (1962).

By upholding the statute against an onslaught of constitutional challenges, the Florida Supreme Court effectively decreed that persons charged with drug trafficking have lost the right to have rights. [30] At best, defendants have only the illusory "right" to surrender rights guaranteed by the United States Constitution--an illusion sustained by the trafficking statute, with its mirage of sentence reductions materializing from inflated, mandatory penalties.

The trafficking statute's sentencing scheme-admittedly unusual-also is cruel.

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[30] Trop v. Dulles, 356 U.S. 86, 102 (1958). Given the inherently dangerous condition of serving as a narcotics informant, see, e.g., Misner & Clough, "Arrestees as Informants: A Thirteenth Amendment Analysis," 29 Stanford L. Rev. 713 (1977), and the fact that Florida's trafficking statute lacks standards as to what constitutes "substantial assistance," or what benefits, if any, will accrue to defendants who attempt this route to freedom, the alternative punishment of rendering "substantial assistance" displays the same characteristics which the Trop Court condemned: "This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, and when or for what cause his existence . . . may be terminated." 356 U.S. at 102.

It breeds mental anguish. Florida's prisons have achieved notoriety as among the most brutal penal warehouses in the nation. Murder, mayhem, and psychological mutilation by homosexual rape, coupled with crisis-level overcrowding, represent the reported conditions of incarceration in the State. 31/ Constitutional rights afford no protection to dead men. Nor do they furnish much comfort to those stripped of their safeguards and confined behind bars. That is the resounding message of both

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31/ See, e.g., Orders of state courts declaring prison conditions unconstitutional. (a-252). Prison brutality is part of the total punishment to which the individual is subjected for his crime, and thus is a proper subject for Eighth Amendment scrutiny. Ingraham v. Wright, 430 U.S. 651, 669 (1977), Hutto v. Finney, 437 U.S. 678, 685 (1978); see also Brooks v. Florida, 389 U.S. 413 (1967), wherein the Court described the conditions of Brooks' incarceration as a "shocking display of barbarism," and held Brooks' confession under such conditions to be involuntary.

penalties of Florida's trafficking statute. Although Rummel v. Estelle, supra, has raised considerable doubts as to whether the Eighth Amendment prohibition against cruel and unusual punishment would invalidate a State's enactment of any sentencing scheme not explicitly drawn to execute defendants, 32/ the scope of the Amendment remains to be explored. The question presented has not been previously considered by this Court,

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32/ It must be noted that, unlike the Texas statute at issue in Rummel, Florida's trafficking statute expressly denies parole throughout the duration of the mandatory sentence automatically imposed, unless the prosecutor determines that the defendant has rendered "substantial assistance." And unlike the Texas statute which was designed to punish the habitual criminal who "has been both geographically informed of the consequences of lawlessness and given an opportunity to reform, all at no avail," Rummel, supra at 278, the trafficking statute's mandatory penalties were designed to punish only those who failed to provide "substantial assistance," and given no opportunity to explain the reasons for their failure.

and justice requires its determination.

CONCLUSION

Law enforcement for centuries has managed ways to draft informants. Now Florida's experimental trafficking statute deploys the courts in this clandestine trade. The danger cannot be overstated: courts, as participants in a statutory scheme designed to compel sacrifice of constitutional rights, cannot also safeguard those rights.

The paramount importance of an independent judiciary to our criminal justice system--a principle which formed the cornerstone in this Court's decision in Roberts--is emasculated by Florida's trafficking statute. And ignored by the Benitez court, which seized upon dicta from Roberts to sustain an insidious sentencing process that sanctions the use of inflated penalties as traps, with hollow rewards as bait. No amount of camouflage can effectively disguise the legislature's admitted plan: The defendant, who reluctantly gives "substantial assistance," will likely receive the same punishment for his crime he would have originally incurred and the penalty not been initially inflated and automatically imposed.

The sleight of hand is obvious.

The defendant reaps counterfeit benefits; created to be given away. The price he pays, however, is genuinely high: Constitutional rights.

The deflation of sentence exchanged for conscription as a government informant constitutes a hollow reward--and one which robs society of any assurance of the defendant's rehabilitation. And this is presuming that mitigation will occur.

There are no guarantees. The whole deal transpires behind closed doors--a setting pregnant with partiality and, perhaps, perjury.

Those defendants who refuse to give up fundamental rights are forced to serve an inflated prison term instead. They are punished severely; for a crime never prosecuted in a court of law: the crime of standing silent to the State's demands for assistance. There is no appeal; in fact, the courts are forbidden to interfere. Then there are those who are simply unable to furnish "substantial assistance." They face the excess years the legislature intended to trade for information. The lawmakers presumed they could furnish it. The lawmakers were wrong; yet the defendants suffer from the mistake. Extra years imposed based on an assumption that ran afoul.

This APPEAL challenges the constitutionality of a statute which authorizes the prosecutor to hold court; and demotes the judge to participant, virtually powerless to stop injustice. The unequivocal purpose of the trafficking statute--to compel criminal defendants to serve as informants--has been sustained by Florida's highest court.

For the foregoing reasons, and those urged in the body of this Brief, this Court should note probable jurisdiction and set this case for full briefing and argument.

Respectfully submitted,

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Appendix

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OCTOBER TERM, 1981

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GEORGE LUIS GONZALES, FRANK VINCENT DICAMILLO,
ALBERTO ARAUJO, LUIS CARLOS PEREZ, and JEFFREY
ELIOT HOWARD,
Appellants,

v.

STATE OF FLORIDA,

Appellee.

On Appeal From The Supreme Court of Florida

APPENDIX

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Q. Order of the Court for Dade County, Florida granting Defendant's Motion to Dismiss Count II of the Information, and holding Section 893.135, Florida Statutes to be Unconstitutional, entered October 11, 1979, in State v.Jackson, Case No. 79-11741. . a-252

R. Order on Motion to Dismiss, State v. Daniel, Bradford County, Florida (1981). a-271

APPENDIX A

OPINION

in

State v. Bilford, 405 So.2d 973
(Fla. November 5, 1981)

OVERTON, Justice

In State v. Benitez, 395 So.2d 386 (Fla. 1981), and State v. Werner, 402 So.2d 386 (Fla. 1981), we held constitutional section 893.135, Florida Statutes (1979), Florida's drug trafficking law. In addition to those arguments we found to be without merit in Benitez and Werner, appellees in the present consolidated appeals ask us to strike section 893.135 as unconstitutional on another ground. Appellees claim that their right to have a jury determine their guilt or innocence is infringed upon because the judge rather than a jury "may reduce or suspend the sentence if he finds that the defendant rendered such substantial assistance." We note that in most traditional sentencing proceedings in both federal and state courts, this discretionary authority is present in the trial judge, and not the jury, without specific statutory guidelines.

We find appellees' assertions totally without merit, and uphold the constitutional validity of section 893.135. The instant causes are remanded for further proceedings.

It is so ordered.

SUNDBERG, C. JF., and ADKINS, BOYD, OVERTON, ALDERMAN and McDONALD, JJ., concur.

APPENDIX B

Opinion

in

State v. Benitez, 395 So.2d 514
(Fla. February 12 1981)
Rehearing Denied April 13, 1981

ENGLAND, Justice

This case comes to us on direct appeal from a trial court order determining that section 893.135, Florida Statutes (1979)--Florida's newly-enacted "drug trafficking" statute--is unconstitutional.

After Carlos and Esperanza Benitez attempted to sell one kilo of cocaine to undercover narcotics agents for $44,000, they were charged by information with "trafficking in cocaine" in violation of section 893.135. In ruling on motions to dismiss the charges, the trial court entered a lengthy order declaring section 893.135 to be facially invalid on a multiplicity of grounds. The state appeals that order, urging error in each of the trial court's rulings.

Section 893.135 is a unique response to a serious and growing concern of the legislature regarding illegal drug activities in the State of Florida. Subsection (1) of the new law establishes severe mandatory minimum sentences for trafficking in various types of illegal drugs. Subsection (2) prevents the trial court from suspending, deferring or withholding the adjudication of guilt or the imposition of sentence on a person convicted under the law, and it eliminates the defendant's eligibility for parole during the minimum mandatory sentence. Subsection (3) provides an "escape valve" from the statute's rigors, based on the initiative of the prosecuting attorney, by permitting the court to reduce or suspend a sentence if a convicted defendant is willing to cooperate with law enforcement authorities in the detection or apprehension of others involved in drug trafficking.

Section 893.135 was enacted to assist law enforcement authorities in the investigation and prosecution of illegal drug trafficking at all levels of distriution, from the importer-organizer down to the "pusher" on the street. The harsh mandatory penalties of subsection (1), ameliorated by the prospect of leniency in subsection (3), were clearly calculated to provide a strong incentive for drug violators to cooperate with law enforcement authorities and become informers. No one argues that the elimination of illegal drug traffic is not a beneficial and worthwhile goal, or that the goals of this legislation are not meritorious.

Nonetheless, in their zeal to combat the flow and distribution of illegal drugs through this novel legislation, legislators knowingly glossed over alleged constitutional defects in the approach that was being developed. We in the judiciary do not have that luxury. Indeed, the trial judge's extensive and detailed order exhibits the multiple, serious difficulties which this statute poses under well-established constitutional principles. We discern six major challenges to the constitutionality of section 893.135, one directed at the mandatory penalties and five directed at the escape valve in subsection (3). The state also half-heartedly challenges the appellees' standing for the first time on this appeal. This last challenge being the easiest to treat, we discuss it first.

1. Standing

The basic rule governing the standing of parties challenging statutory enactments was recently stated in Sandstrom v. Leader, 370 So.2d 3, 4 (Fla. 1979):

> Fundamental constitutional principles dictate that one may not challenge those portions of an enactment which do not adversely affect his personal or property rights. . . Such a personal stake in the outcome of the controversy is necessary "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions[.]" (citations omitted).

The state argues that, because appellees have not yet been convicted, they have no personal stake in this penalty-oriented statute.

To state the assertion is to demonstrate its absurdity. A party subject to criminal prosecution clearly has a sufficient personal stake in the penalty which the offense carries. This is wholly unlike cases in which criminal defendants have challenged portions of a statute which have nothing to do with their prosecution. See State v. Millington, 377 So.2d 685 (Fla. 1979); State v. Champe, 373 So.2d 874 (Fla. 1978).

2. Cruel and Unusual Punishment

Appellees argue that the mandatory minimum sentences of section 893.135(1) violate the cruel and unusual punishment clauses of the state [1] and federal [2] constitutions. Relying on various death penalty decisions of the United States Supreme Court, [3] they first contend that the mandatory minimum sentences unconstutionally eliminate the exercise of discretion in sentencing. This argument was rejected by this Court in McArthur v. State, 351 So.2d 972 (Fla. 1977), and warrants no further discussion here.

Appellees also argue that the mandatory sentences in section 893.135 constitute cruel and unusual punishment since they are unnecessarily severe and disproportional to the nature of the crime. This Court has consistently upheld minimum mandatory sentences, regardless of their severity, against constitutional attacks arguing cruel and unusual punishment. *See*, *e.g.*, *McArthur v. State*, 351 So.2d 972 (Fla. 1977); *Banks v. State*, 342 So.2d 469 (Fla. 1976); *O'Donnell v. State*, 326 So.2d 4 (Fla. 1975). The dominant theme which runs through these decisions is that the legislature, and not the judiciary, determines maximum and minimum penalties for violations of the law. While it is often said that in an extreme case--wherein the sentence was *grossly* disproportionate to the severity of the crime--the legislature's judgment would run afoul of the constitutional prohibition, this Court has never addressed such a situation in the context of statutory sentencing minima.

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[1] Art. 1, § 17, Fla.Const.

[2] U.S.Const. amend. VIII.

[3] Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); Roberts v. Louisiana, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976).

The recent decision of the United States Supreme Court in Rummel v. Estelle, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980), indicates that similar considerations prevail under the federal constitution. In that case, the Court held that a mandatory life sentence imposed on the petitioner pursuant to a Texas recidivist statute did not constitute cruel and unusual punishment under the eighth amendment. The majority's analysis of this area noted that:

> [t]his Court has on occasion stated that the Eighth Amendment prohibits imposition of a sentence which is grossly disproportionate to the severity of the crime. . . In recent years this proposition has appeared most frequently in opinions dealing with the death penalty. . . Because a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishment to capital cases are of

> limited assistance in deciding the constitutionality of the punishment meted out to Rummel.
>
> Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare.

Id., 445 U.S. at 271, 100 S.Ct. at 1138 (citations omitted). After analyzing one of these rare successful challenges, Weems v. United States, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910), the majority concluded:

> Given the unique nature of the punishments considered in Weems and in the death-penalty cases, one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative.

Id., 445 U.S. at 273, 100 S.Ct. at 1139 (footnote omitted).

The penalties imposed by section 893.135 are certainly severe, but they are by no means cruel and unusual in light of their potential deterrent value and the seriousness of the crime involved. See McArthur v. State; O'Donnell v. State; accord, People v. Broadie, 37 N.Y.2d 100, 371 N.Y.S.2d 471, 332 N.E.2d 338, cert. denied, 423 U.S. 950, 96 S.Ct. 372, 46 L.Ed.2d 287 (1975).

3. Due Process-Vagueness

Little discussion is needed concerning appellees' suggestion that subsection (3) is impermissibly vague in defining a convicted defendant who is eligible for lenient treatment as "any person . . . who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals." Being a description of a post-conviction form of plea bargaining rather than a definition of the crime itself, the phrase "substantial assistance" can tolerate subjectivity to an extent which normally would be impermissible for penal statutues. Cf. Linville v. State, 359 So.2d 450 (Fla. 1978). There is no due process infirmity.

4. Equal Protection

Appellees' suggestion that subsection (3) denies equal protection of the law to convicted defendants who cannot provide "substantial assistance" to law enforcement officials is patently without merit. This legislation manifestly passes the rational basis test. See

Hamilton v. State, 366 So.2d 8 (Fla. 1978).

5. Separation of Powers

Two basic arguments by appellees are directed at Florida's constitutional separation of governmental powers. Art. II, § 3, Fla.Const. First, they assert that subsection (3) encroaches on the Court's rulemaking role, Art. V, § 2(a), Fla.Const., in that it conflicts with Rule 3.800(b), and Rule 3.171 of the Florida Rules of Criminal Procedure. The statute differs from these rules, of course, but it in no way so conflicts with them as to offend the constitution.

Rule 3.800(b) permits the reduction of legal sentences, yet since it specifically excludes minimum mandatory sentences from its operation, its procedure obviously are not incompatible with section 893.135. Likewise, Rules 3.720 (b) and 3.171 do not pose any obstacle to the operation of section 893.135. Rule 3.720(b) provides that at a sentencing hearing, the court shall "[e]ntertain submissions and evidence by the parties which are relevant to the sentence. . .." Subsection (3) states that "[t]he arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any [motion for reduction or suspension of sentence]." The statute does not explicitly exclude the defendant from submitting evidence in his behalf, and it does not offend the statutory scheme to afford him that right. Finally, applicable procedural safeguards in Rule 3.171 can be afforded to defendants, to the extent they do not conflict with the explicit language of subsection (3). No infirmity of constitutional dimension attends the omission of those that do.

Appellees' second argument premised on the constitutional separation of powers is that subsection (3) usurps the sentencing function from the judiciary and assigns it to the executive branch, since the benefits of subsection (3) are triggered by the initiative of the state attorney. Under the statute, the ultimate decision on sentencing resides with the judge who must rule on the motion for reduction or suspension of sentence. "So long as a statute does not wrest from courts the final discretion to impose sentence, it does not infringe upon the constitutional division of responsibilities." People v. Eason, 40 N.Y.2d 297, 301, 386 N.Y.S.2d 673, 676, 353 N.E.2d 587, 589 (1976) (emphasis in original) (rejecting a separation of powers attack on a similar provision in New York's drug laws).

6. Self-incrimination

Finally, the appellees argue that section 893.135 coerces a defendant into relinquishing his fifth amendment privilege against self-incrimination by denying him sentencing leniency unless he cooperates with the authorities. We reject this argument, primarily because it depends on unwarranted assumptions about the nature of the informer's disclosures. Nothing in the statute suggests that "substantial assistance" must incriminate the defendant of crimes other than those for which he has already been convicted (and for which no fifth amendment privilege is obviously necessary). We acknowledge the risk of prosecution in other jurisdictions.

Nonetheless, a defendant need not invoke subsection (3), as nothing in the statute is compulsive. Putting a defendant to a difficult choice is not necessarily forbidden by the fifth amendment. See, e.g., Corbitt v. New Jersey, 439 U.S. 212, 218, 99 S.Ct. 492, 497, 58 L.Ed.2d 466 (1978) ("[N]ot every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid." (footnote omitted); Bordenkircher v. Hayes, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978); McGautha v. California, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971). No constitutional deprivation results if a defendant elects to reap the benefits of subsection (3).

With respect to those cases which say that the trial courts may not enhance a sentence based on a defendant's failure to cooperate with the authorities, see United States v. Garcia, 544 F.2d 681 (3rd Cir. 1976); S.Ct. 188, 46 L.Ed.2d 122 (1975); United States v. Rogers, 504 F.2d 1079 (5th Cir. 1974), cert. denied, 422 U.S. 1042, 95 S.Ct. 2655, 45 L.Ed.2d 693 (1975), we believe that Roberts v. United States, 445 U.S. 552, 100 S.Ct. 1358, 63 L.Ed.2d 622 (1980), went along way toward resolving this issue against appellees. The Court in Roberts concluded that the district court properly considered the defendant's refusal to cooperate as one factor in imposing consecutive sentences. Admittedly, a fifth amendment claim was not properly raised in Roberts and "would have merited serious consideration" if it had been. Id. at 559, 100 S.Ct. at 1364. We conclude, however, that for fifth amendment purposes the situation in Roberts is distinguishable from that here. A sentence reduction obtained by a sentenced convict due to his cooperation is not tantamount to the enhancement of a sentence imposed on an unsentenced, but convicted defendant as a result of his lack of cooperation. The former is no different from a gratuitous sentence reduction offered to one already incarcerated who, even without statutory sanction, risks reincrimination in exchange for early release benefits.

Our disposition of appellees' challenges obviates the need to consider the severability of subsection (3) from the statute. We hold that section 893.135 is constitutional. The order of the trial court is reversed, and the case is remanded for further proceedings.

SUNDBERG, C.J., and ADKINS, BOYD, OVERTON, ALDERMAN and McDONALD, JJ., concur.

APPENDIX C

Opinion

in

State v. Werner, 402 So.2d 386
(Fla. June 25, 1981)
Rehearing Denied September 8, 1981

ENGLAND, Justice

Robert K. Werner and Jack E. Carlson were charged by information with trafficking in cocaine in violation of section 893.135, Florida Statutes (1979). This appeal comes to us under article V, section 3(b)(1), of the Florida Constitution (1972), from an order of the trial court granting their motions to dismiss the charges against them and declaring the statute unconstitutional.

All but one of the issues presented by this appeal were resolved against Werner and Carlson in State v. Benitez, 395 So.2d 514 (Fla.1981), and State v. Yu, 400 So.2d 762 (Fla.1981). The one unresolved issue they raise is whether the term "may" in section 893.135(3) is unconstitutionally vague, since it vests the prosecutor with unbridled discretion when engaging in so-called "post-conviction information bargaining." Subsection (3) provides that "[t]he state attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of this section and who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals." Werner and Carlson claim that this provision leaves open the possibility that a prosecutor might secure "substantial assistance" from the defendant, and yet not live up to his side of the bargain by moving for a reduction or suspension of the sentence.

While their concerns may be sincere, they do not provide a constitutional basis to invalidate the enactment.

State attorneys are "the prosecuting officer[s] of all trial courts" under our constitution [1], and as such must have broad discretion in performing their duties. Discretion to initiate the post-conviction information bargaining process is inherent in the prosecutorial function. Absent a clear constitutional violation in a particular factual context, we refuse to intrude on the prosecutorial function by holding subsection (3) unconstitutional on its face.

Additionally, section 893.135 does not directly abrogate the substantive rules of law governing plea bargaining

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1/ Art. V, § 17, Fla.Const.

and plea arrangements [2], and these rules should be followed, to the extent they can in a post-conviction context, by the parties and the trial judge. Good faith compliance with rules governing the plea bargaining process will prevent prosecutorial overreaching and alleviate any possible constitutional infirmities which might plague the unique procedure established by subsection (3).

The order of the trial court is reversed, and the case is remanded for further proceedings.

It is so ordered.

SUNDBERG, C.J., and ADKINS, BOYD, OVERTON, ALDERMAN and McDONALD, JJ., concur.

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[2] See, e.g., Bordenkircher v. Hayes, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978); Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); Fla.R. Crim.P. 3.170 & 3.171.

APPENDIX D

ON THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT IN AND FOR
DADE COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO. 79-8211

ORDER

THE STATE OF FLORIDA
Plaintiff
vs.
HOWARD MATTHEW BILFORD,
EDUARDO GARCELL,
GEORGE LUIS GONZALES,
FRANK VINCENT DICAMILLO,
ALBERTO ARAUJO,
LUIS CARLOS PEREZ, and
JEFFREY ELIOT HOWARD,
Defendants.

THIS MATTER, coming on to be heard upon the Defendants' Motion to Dismiss certain Counts of the Information pending against them, and the Court having heard from the parties and being otherwise fully advised in the premises, it is hereby

ORDERED, ADJUDGED and DECREED that

Subsection (3) of Section 893.135 prescribes a severe mandatory minimum sentence without parole or other mitigation unless the Defendant provides "substantial assistance" in the investigation or prosecution of others, thus unfairly conditioning the grant of a substantial benefit upon the relinquishment of the Defendant's right to remain silent and penalizing him for the exercise of that Constitutional right, all in violation of the privilege against self-incrimination protected by Article I, Section 9 of the Constitution of the State of Florida and by the Fifth and Fourteenth Amendments to the United States Constitution, contrary to our accusatorial, as opposed to inquisitional, system of justice which is implicit in our traditions and organic law, denying the Defendant due process of law guaranteed by Article I, Section 9 of the Constitution of the State of Florida and by the Fourteenth Amendment to the United States Constitution. Subsection (3) contains no reference to plea bargaining or pleas, whatsoever. It only operates once one is convicted and is being or has been, sentenced. It exacts a waiver of the Constitutional privilege against self-incrimination to enjoy any hope of reducing or suspending the mandatory minimum sentences that statute imposes. But such a penalty is beyond the power of the Legislature to demand.

This new statute seeks to compel information which naturally and necessarily is self-incriminating but it provides no coextensive grant of immunity for those who give such "substantial assistance." Without a guarantee that compelled or coerced testimony will not be used, directly or indirectly, to further any criminal prosecution pending or which may be brought against the subject, basic precepts of our accusatorial system of justice are offended. Kastigar v. United States, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972).

In Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 625, 17 L.Ed.2d 574 (1967), the Supreme Court stated:

> There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price. ***We now hold the protection of the individual under the Fourteenth Amendment against coerced statement prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic.

So stating, the Supreme Court found a waiver of immunity invalid when coerced by the threat of the loss of policemen's job.

In a companion cause to Garrity, supra, the Supreme Court extended the protection of the Fifth Amendment not only to the exclusion of testimony coerced by the threat of penalty in any subsequent criminal proceedings, but also to invalidating the penalty of disbarrment imposed for the assertion by a lawyer of his Fifth Amendment right not to respond to a subpoena duces tecum. Spevak v. Klein, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574 (1967). The Court stated, 385 U.S. at 515:

> In this context "penalty" it not restricted to fine or imprisonment. It means, as we said in Griffin v. California, 380 U.S. 609, the imposition of any sanction which makes assertion of the Fifth Amendment privilege "costly." (Emphasis added)

Accord, Gardner v. Broderick, 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (1968), (statute which attempted to coerce the waiver of one's privilege against self-incrimination without immunity by the penalty of loss of employment was held constitutionally invalid); Sanitation Men v. Sanitation Comm'r, 392 U.S. 280, 284, 88 S.Ct. 1917, 29 L.Ed.2d 1089 (1968) (State action of giving public employees "a choice between surrendering their constitutional rights or their jobs" was unconstitutional). The Court in Spevack, found that disbarrment was indeed "costly", 385 U.S. at 516:

> The threat of disbarrment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion to make a lawyer relinquish the privilege. That

> threat is indeed as much an instrument of compulsion as "the use of legal process to force from the lips of the accused individual the evidence necessary to convict him. . ." (citations omitted).

The Florida courts have followed this line of authority and have held that one cannot be constitutionally coerced to waive one's right against self-incrimination by threat of job loss. See, e.g., Anson v. Department of Revenue, 354 So.2d 386 (Fla. 1st DCA 1977); Lurie v. Florida Board of Dentistry, 288 So.2d 223 (Fla. 1973).

There is, however, a great difference between job loss or contractual promises as involved in the cases cited above, and the loss of liberty and the right to individual sentencing consideration and/or leniency involved in the cases before this Court. Certainly the loss of liberty must demand as much if not more protection by the Fifth Amendment than the threat of pecuniary loss.

And so the federal courts have uniformly recognized. Where judges have sought to punish silence and/or reward a confession or assistance to the government by a defendant at sentencing and have expressly stated that these factors will determine the sentence they impose, these sentences have been vacated as unconstitutionally coercive, upon the same rationale as those cases cited above. See, Thomas v. United States, 368 F.2d 941 (5th Cir. 1966); United States v. Rodriquez, 498 F.2d 302 (5th Cir. 1974); United States v. Yurasovich, 580 F.2d 1212 (3d Cir. 1978); United States v. Rogers, 504 F.2d 1079 (5th Cir. 1974). As it was persuasively stated in United

States v. Garcia, 544 F.2d 681 (3d Cir. 1976):

> The appellants were put to a Hobson's choice: remain silent and lose the opportunity to be objects of leniency, or speak and run the risk of additional prosecution. A price tag was thus placed on appellants' expectations of maximum consideration at the bar of justice. They had to waive the protection afforded them by the Fifth Amendment. This price was too high. We, therefore, cannot permit the sentence to stand.

Contrary to this well-settled body of law, under subsection (3), the Florida Legislature mandates this unconstitutional, coercive method of obtaining evidence.

2. Section 893.135 essentially enacts a new offense of failing to inform against fellow citizens and other persons, all in violation of the rights

set forth in Paragraph 1 above and contrary to basic precepts of a free society.

3. Section 893.135 prescribes a severe mandatory minimum sentence without parole or other mitigation unless the defendant cooperates to the satisfaction of the state attorney and/or the sentencing judge and, therefore, inherently and necessarily infringes upon the defendant's basic constitutional right to have the accusations against him proved by the State to the satisfaction of a jury, all in violation of the basic rights of the accused guaranteed by Article 1, Section 2, 9, 16, 17, 21 and 22, of the Constitution of the State of Florida and of the Fifth, Sixth, Eighth, Ninth, Tenth and Fourteenth Amendments to the United States Constitution.

4. Subsection (3) of Section

893.135, Florida Statutes, violates the due process clause of Article 1, Section 9, of the Constitution of the State of Florida and the Fifth Amendment of the Constitution of the United States in that the term "substantial assistance" used therein is unconstitutionally vague, indefinite, and uncertain. Indeed, a review of the transcripts of the Legislative proceedings (both in Committee and on the Floor) incident to passage of this Act reflect numerous occasions when the legislators themselves expressed concern that the term "substantial assistance" was unworkably vague and uncertain.

5. Subsection (3) of Section 893.135, Florida Statutes, prescribes mandatory minimum sentences without parole or other mitigation unless the state attorney initiates a motion to

reduce or suspend the sentence thereby violating basic constitutional principles of division and separation of Executive, Legislative and Judicial powers and responsibilities, and Specifically:

A. Effects an unwarranted encroachment into the judicial sentencing function by delegating to the Executive branch (i.e., State Attorney's Office) the ultimate sentencing function which Constitutionally must vest exclusively in the Judicial branch; and

B. Invades the Court's inherent rule-making powers by purporting to prescribe who may petition the Court and under what circumstances.

All of the above being contrary to the guaranty of a Republican form of government, as decreed by Article 11, Section 3 and Article V, Section 1 of the Constitution of the State of Florida.

6. Section 893.135, Florida Statutes, is an unconstitutionally vague, indefinite, uncertain, overbroad, and arbitrary statute in that the provisions thereof condition liberty upon the following terms:

(a) That the state attorney "may" move the sentencing court to reduce or suspend sentences without any standards or guidelines for the exercise of such discretion; and

(b) That the state attorney's motion be made only in connection with a Defendant who provides "substantial assistance" in the investigation and prosecution of others; and

(c) That the benefits are available only to Defendants who have accomplices, accessories, co-conspirators or principals in the crime and only when the state attorney requires, and the Defendant is capable of rendering, "substantial assistance" in their identification, arrest and conviction; all in violation of Article 1, Sections 2, 4, and 9 of the Constitution of the State of Florida and of the Fifth and Fourteenth Amendments to the United States Constitution.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that notwithstanding the "saving clause" contained in Section 3 of the Act (Chapter 79-1), passed as Senate Bill 83 and signed by the Governor on April 6, 1979 without the provision above declared invalid and unconstitutional, the other provisions of the Act cannot be given proper effect for the following reasons:

(1) The mere inclusion of a "saving or severability clause" in the Act is not controlling in determining the intent and purpose of the Legislature. See State v. Lee, 356 So.2d 276, 284 (Fla. 1978).

(2) The Court has reviewed the various transcripts reflecting the legislative history of Section 893.135, and determines that the legislature clearly did not intend for Subsection (3) of §893.135, Florida Statutes, (relating to relief for defendants who provide "substantial assistance") to be severable from the portions of the Statute imposing severe mandatory minimum sentences.

(3) In addition, it was clearly the intent and purpose of the Legislature in drafting this statute that most defendants convicted thereunder would make use of the punitive and unconstitutional "substantial assistance" provision and that the mandatory sentences the remainder of the statute provides for would be, accordingly, applied sparingly. Therefore, once this "substantial assistance" provision is vitiated as unconsti-

tutional, were the remainder of the statutes to remain in force, the impact both physical and otherwise of the law would drastically exceed the anticipations of the Legislature when they passed the law.

(4) Accordingly, this Court finds:

(a) That the statute as a whole would not have been enacted without the inclusion of subsection (3) of Section 893.135. See High Ridge Management Corp. v. State, 354 So.2d 377 (Fla. 1977); Presbyterian Homes of Synod of Florida v. Wood, 297 So.2d 556, 559 (Fla. 1974); State ex. rel. Limus v. Newell, 85 So.2d 124, 128 (Fla. 1956); State v. Calhoun County, 127 Fla. 304, 311-13, 170 So. 883, 886 (1936); and

(b) That without the provisions contained in subsection (3) being given effect, application of the statute would create a result never contemplated by the Legislature. See State ex. rel. James v. Garrell, 137 Fla. 324, 330, 188 So.812, 815 (1939) (on rehearing); Hayes v. Walker, 54 Fla. 163, 168, 44 So. 747, 749 (1907); and

(c) That the provisions of the Act contained in subsection (3) were a clear and obvious inducement to the enactment of the other provisions of §893.135, specifically, subsections (1) and (2) thereof. See, State ex. rel. West v. Hilburn, 70 Fla. 55, 61-62, 69 So. 784, 786 (1915); Dade County v. Keys, 141 So.2d 819, 821-22 (Fla. 3d DCA 1962), cert. discharged, 152 So.2d 171 (Fla. 1963).

THEREFORE and ACCORDINGLY, Subsection (1) and (2) of §893.135, Florida Statutes, which creates mandatory minimum sentences for the offense of trafficking in controlled substances are declared "non-severable" from subsection (3) of §893.135, Florida Statutes, which provide for suspension or reduction of said sentences; and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that, for the foregoing reasons, the respective motions of defendants to dismiss certain Counts of the Information pending against them, be and hereby, are granted as follows:

As to Case No. 79-8211, Counts I and II are dismissed.

DONE AND ORDERED at Miami, Dade County, Florida this 5th day of October, 1979.

DONE AND ORDERED at Miami, Dade County, Florida this 5th day of October, 1979.

/S/
HONORABLE JOHN A. TANKSLEY
Circuit Court Judge

Copies furnished all counsel

APPENDIX E

IN THE SUPREME COURT OF FLORIDA

CASE NO. 58,417

CIRCUIT COURT NO. 79-8211
(DADE)

THE STATE OF FLORIDA,

Appellant,

vs.

HOWARD MATTHEW BILFORD,
EDUARDO GARCELL,
GEORGE LUIS GONZALES,
FRANK VINCENT DICAMILLO,
ALBERTO ARAUJO,
LUIS CARLOS PEREZ, and
JEFFREY ELIOT HOWARD,

Appellees.
______________________________/

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that HOWARD MATTHEW BILFORD, EDUARDO GARCELL, GEORGE LUIS GONZALES, FRANK VINCENT DICAMILLO, ALBERTO ARAUJO, LUIS CARLOS PEREZ, and JEFFREY ELIOT HOWARD, Appellees in above-captioned case, hereby appeal to the Supreme Court of the United States from the final order of the Supreme Court of Florida, reversing the order of the Circuit Court of Dade County declaring Section 893.135 of the Florida Statutes (1979) unconstitutional. The order of the Supreme Court of Florida was rendered on November 5, 1981. No Petition for Rehearing was filed. The order became final thirty (30) days thereafter, on Monday, December 7, 1981.

This appeal is taken pursuant to 28 USC §1257(2).

/s/ William P. Cagney, III
WILLIAM P. CAGNEY, III
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Honorable Jim Smith, Attorney General, State of Florida, The Capitol, Tallahassee, Florida by U.S. Mail on this 15th day of January, 1982.

/s/ William P. Cagney,III
WILLIAM P. CAGNEY, III
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Attorneys for Appellees

The Notice of Appeal was filed in the Supreme Court of Florida on January 18, 1982.

APPENDIX F

Section 893.135
of the
Florida Statutes (1979)

893.135 Trafficking: mandatory sentences: suspension or reduction of sentences.--

(1) Except as authorized in this chapter or in chapter 500:

(a) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, in excess of 100 pounds of cannabis is guilty of a felony of the first degree, which felony shall be known as "trafficking in cannabis." If the quantity of cannabis involved:

1. Is in excess of 100 pounds, but less than 2,000 pounds, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 calendar years and

to pay a fine of $25,000.

2. Is 2,000 pounds or more, but less than 10,000 pounds, such person shall be sentenced to a mandatory minimum term of imprisonment of 5 calendar years and to pay a fine of $50,000.

3. Is 10,000 pounds or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and to pay a fine of $200,000.

(b) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of cocaine or of any mixture containing cocaine, as described in s.893.135(2)(a), is guilty of a felony of the first degree, which felony shall be known as "trafficking in cocaine." If the quantity involved:

1. Is 28 grams or more, but less than 200 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 calendar years and to pay a fine of $50,000.

2. Is 200 grams or more, but less than 400 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 5 calendar years and to pay a fine of $100,000.

3. Is 400 grams or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and to pay a fine of $250,000.

(c) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 4 grams or more of any morphine, opium, or any salt, isomer, or salt of an isomer thereof, including heroin, as described in s.893.03(1)(b) or (2)(a), or 4 grams or more of any mixture containing any such substance, is guilty of a felony of the first degree, which felony shall be known as "trafficking in illegal drugs." If the quantity involved:

1. Is 4 grams or more, but less than 14 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 calendar years and to pay a fine of $100,000.

2. Is 14 grams or more, but less than 28 grams, such person shall be sentenced to a mandatory term of imprisonment of 10 calendar years and to pay a fine of $100,000.

3. Is 28 grams or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 25 calendar years and to pay a fine of $500,000.

(2) Notwithstanding the provisions of s.948.01, with respect to any person who is found to have violated this section, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld, nor shall such person be eligible for parole prior to serving the mandatory minimum term of imprisonment prescribed by this section.

(3) The state attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of this section and who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals. The arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any such

motion. Upon good cause shown, the motion may be filed and heard in camera. The judge hearing the motion may reduce or suspend the sentence if he finds that the defendant rendered such substantial assistance.

APPENDIX G

CONSTITUTION OF THE UNITED STATES AMENDMENTS

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jursidiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX H

SPRING 79

HOWARD MATTHEW BILFORD,
EDUARDO GARCELL,
GEORGE LUIS GONZALES,
FRANK VINCENT DICAMILLO,
ALBERTO ARAUJO,
LUIS CARLOS PEREZ
and
JEFFREY ELIOT HOWARD.

I. CONSPIRACY TO TRAFFIC IN CANNABIS 777.04 Fel.
II. TRAFFICKING IN CANNABIS
III. UNLAWFUL SALE OF CANNABIS
IV. MANUFACTURE OR POSSESSION WITH INTENT TO SELL, MANUFACTURE OR DELIVER CANNABIS
V. UNLAWFUL POSSESSION OF CANNABIS
VI. POSSESSION OF CONTROLLED SUBSTANCE "G"
VII. UNLAWFUL POSSESSION OF CANNABIS "G"

COUNT I

I, THOMAS DARBY, Assistant State Attorney of the Eleventh Judicial Circuit of Florida, on the authority of JANET RENO, State Attorney, prosecuting for the State of Florida, in the County of Dade, under oath, further information makes that HOWARD MATTHEW BILFORD, EDUARDO GARCELL, GEORGE LUIS GONZALES, FRANK VINCENT DICAMILLO, ALBERTO ARAUJO, LUIS CARLOS PEREZ, and JEFFREY ELIOT HOWARD beginning on the 10th day of May, 1979, and continuing through the 11th May 1979, did unlawfully and feloniously agree, conspire, combine or confederate, one with the other, to commit one or more felonies, to-wit: trafficking in CANNABIS, in excess of 2,000 pounds, and/or the sale, possession or delivery of, in excess of 100 pounds of cannabis, meaning all parts of the plant cannabis sativa, including all varieties thereof, the resin extracted from any part of the plant; and every compound, manufacture, salt derivative, mixture or preparation of the plant, its seeds or resin, as defined in and contrary to the provisions of 893.13 and 893.135 Florida Statutes, to one GARY BROWN, and in furtherance of said conspiracy HOWARD MATTHEW BILFORD did meet with GARY BROWN on the 10th and 11th day of May, 1979, to plan and discuss details as to the amount, price and arrangements for the sale and delivery of cannabis to GARY BROWN, and as part of this plan, GARY BROWN did meet with EDUARDO GARCELL, GEORGE LUIS GONZALES, FRANK VINCENT DICAMILLO, ALBERTO ARAUJO, and LUIS CARLOS PEREZ, on the 11th day of May, 1979, in order to inspect and obtain delivery of the said cannabis, stored for the purpose of sale at the residence of JEFFREY ELIOT HOWARD with the knowledge and consent of JEFFREY ELIOT HOWARD all of said acts and transactions being part of a concerted plan within the time of the pending conspiracy, said conspiracy being in violation of 777.04 Florida Statutes, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

COUNT II

And I, THOMAS DARBY, Assistant State Attorney of the Eleventh Judicial Circuit of Florida, on the authority of JANET RENO, State Attorney, prosecuting for the State of Florida, in the County of Dade, under oath, further information makes that, HOWARD MATTHEW BILFORD, EDUARDO GARCELL, GEORGE LUIS GONZALES, FRANK VINCENT DICAMILLO, ALBERTO ARAUJO, LUIS CARLOS PEREZ and JEFFREY ELIOT HOWARD, on the 11th day of May, 1979, in the County and State aforesaid, did knowingly sell, manufacture or delivery or were knowingly in actual or constructive possession of, in excess of 2,000 pounds but less than 10,000 pounds of CANNABIS, meaning all parts of any plant Cannabis, whether growing or not; the seeds thereof, the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture or preparation of the plant, its seeds or resin, in violation of 893.135 Florida Statutes, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

COUNT III

And I, THOMAS DARBY, Assistant State Attorney of the Eleventh Judicial Circuit of Florida, on the authority of JANET RENO, State Attorney, prosecuting for the State of Florida, in the County of Dade, under oath, further information makes that, HOWARD MATTHEW BILFORD, EDUARDO GARCELL, GEORGE LUIS GONZALES, FRANK VINCENT DICAMILLO, ALBERTO ARAUJO, LUIS

CARLOS PEREZ and JEFFREY ELIOT HOWARD, on the 11th day of May, 1979, in the County and State aforesaid, did unlawfully and feloniously sell, manufacture, or deliver, or possess with intent to sell, manufacture or deliver, a controlled substance, to-wit: CANNABIS, meaning all parts of the plant Cannabis Sativa, including all varieties thereof, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt derivative, mixture, or preparation of the plant, its seeds or resin, in an amount in excess of 100 pounds, to one GARY BROWN, in violation of 893.13 Florida Statutes, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

COUNT IV

And I, THOMAS DARBY, Assistant State Attorney of the Eleventh Judicial Circuit of Florida, on the authority of JANET RENO, State Attorney, prosecuting for the State of Florida, in the County of Dade, under oath, further information makes that, HOWARD MATTHEW BILFORD, EDUARDO GARCELL, GEORGE LUIS GONZALES, FRANK VINCENT DICAMILLO, ALBERTO ARAUJO, LUIS CARLOS PEREZ and JEFFREY ELIOT HOWARD, on the 11th day of may, 1979, in the County and State aforesaid, did unlawfully and feloniously manufacture, or possess with intent to sell, manufacture, or deliver, a controlled substance, to-wit: in excess of 100 pounds of CANNABIS, meaning all parts of the plant Cannabis Sativa, including all varieties thereof, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt derivative, mixture, or preparation of the plant, its seeds or resin, in violation of 893.13(1)(a) Florida Statutes, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

COUNT V

And I, THOMAS DARBY, Assistant State Attorney of the Eleventh Judicial Circuit of Florida, on the authority of JANET RENO, State Attorney, prosecuting for the State of Florida, in the County of Dade, under oath, further information makes that, HOWARD MATTHEW BILFORD, EDUARDO GARCELL, GEORGE LUIS GONZALES, FRANK VINCENT DICAMILLO, ALBERTO ARAUJO, LUIS CARLOS PEREZ and JEFFREY ELIOT HOWARD, on the 11th day of May, 1979, in the County and State aforesaid, did unlawfully and feloniously have in their actual or constructive possession a controlled substance, to-wit: CANNABIS, meaning all parts of the plant Cannabis Sativa, including all varieties thereof, whether growing or not; the seeds thereof, the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture or preparation of the plant, its seeds or resin, in an amount in excess of 100 pounds, in violation of 893.13 Florida Statutes, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

COUNT VI

And I, THOMAS DARBY, Assistant State Attorney of the Eleventh Judicial Circuit of Florida, on the authority of JANET RENO, State Attorney, prosecuting for the

State of Florida, in the County of Dade, under oath, further information makes that, JEFFREY ELIOT HOWARD, on the 11th day of May, 1979, in the County and State aforesaid, did unlawfully and feloniously have in his actual or constructive possession a controlled substance, to-wit: COCAINE, in violation of 893.13 Florida Statutes, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

COUNT VIII

And I, THOMAS DARBY, Assistant State Attorney of the Eleventh Judicial Circuit of Florida, on the authority of JANET RENO, State Attorney, prosecuting for the State of Florida, in the County of Dade, under oath, further information makes that, JEFFREY ELIOT HOWARD, on the 11th day of May, 1979, in the County and State aforesaid, did unlawfully and feloniously have in his actual or constructive possession a controlled substance, to-wit: CANNABIS, meaning all parts of the plant Cannabis Sativa, including all varieties thereof, whether growing or not; the seeds thereof, the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture or preparation of the plant, its seeds or resin, in an amount greater than five (5) grams, in violation of 893.13 Florida Statutes.

APPENDIX I

OPINION
in

State v. LeCompte, ___So.2d___, 30 CrL 2225 (La. Nov.16,1981)

Digest of Opinion: On Original hearing of this case, we found La.R.S. 40:967(G)(2) constitutional. That provision allows trial courts to reduce or suspend sentences, on motion by the prosecutor, for a defendant who provides "substantial assistance" in bringing participants in his case or other drug trafficking cases to justice. However, we construed that section to permit the reduction or suspension of sentence only until such time as the execution of sentence has begun. See 29 CrL 2259 (1980).

Upon application of the defendants, we granted a rehearing because of our concern that our treatment of the challenge to the statute requires additional consideration. Our concern on rehearing focuses upon the role given the district attorney by the statute. We will consider anew the defendants' separation of powers challenge.

[Text] On original hearing we concluded that Louisiana's constitutional separation of powers was not offended, even conceding (or assuming) that a fully discretionary motion by the district attorney is required to trigger the trial judge's exercise of the discretion afforded him by the statute to reduce or suspend the sentence. We reasoned that the final or ultimate decision to reduce or suspend the sentence rests not with the district attorney but with the courts. This reason for finding that the statute did not violate Louisiana's separation of powers was the identical one given by the Florida Supreme Court in interpreting an almost identical statute under a similar separation of powers attack. State v. Benitez. Benitez, in turn, relied upon a 1976 decision of the New York Court of Appeal, People v. Eason: "So long as a statute does not wrest from courts the final discretion to impose sentence, it does not infringe upon the constitutional division of responsibilities."

We are not persuaded by the logic of those opinion. Giving the trial judge the final authority to impose a reduced or suspended sentence, if the district attorney in his discretion decides to recommend such, is hardly a good argument that the judiciary's power to sentence following conviction is not invaded by the district attorney. More persuasive in our view are Esteybar v. Municipal

Court for the Long Beach Judicial District of Los Angeles County, 485 P.2d 1140 (Calif.1971), and the People v. The Superior Court of San Mateo County, Lawrence On Tai Ho, Real Party in Interest, 520 P.2d 405 (Calif.1974).

In Esteybar, the defendant was charged with possession of marijuana, an offense which in the absence of any prior felony convictions may be treated as either a felony or a misdemeanor. The statute, however, dictated that the magistrate could proceed with the offense as a misdemeanor only after first obtaining the consent of the prosecuting attorney.*** The court concluded that the defendant was surely entitled to have an independent determination of whether he should be held to an independent determination of whether he should be held to answer on a felony or misdemeanor and this was not possible when the exercise of judicial discretion depended upon the pleasure of the executive.

The On Tai Ho case also involved the constitutionality of a prosecutorial veto over an exercise of judicial power. At issue was a California Penal Code provision which required the consent of the prosecutor before a trial judge might order that a defendant charged with a narcotic offense be diverted into a pretrial program for treatment and rehabilitation. The court quoted an earlier decision, People v. Tenorio, 473 F.2d 993, (Calif.1970) which had said: "The judicial power is compromised when a judge, who believes that a charge should be dismissed in the interest of justice wishes to exercise the power to dismiss but finds that before he may do so he must bargain with the prosecutor. The judicial power must be independent, and a judge should never be required to pay for its exercise." [End Text]

The court found that the penal provision unconstitutionally infringed on the judiciary's province.

[Text] In this reconsideration of the separation of powers issue, we are not satisfied with our earlier reasons. If the trial court's decision whether to reduce or suspend the sentence is conditioned upon the district attorney's arbitrary discretion, admittedly coupled with his having to prove defendant's substantial assistance in the identification, arrest or conviction of other parties, the consequent sentencing (reduced or not, suspended or not) is at least as much the discretionary choice of the district attorney as that of the trial judge. Actually it is more so the choice of the district attorney if his motion is an outset requirement in order to permit the sentencing judge's considering a reduced or suspended sentence. Under Louisiana's constitutional separation of powers, the district attorney, a member of the executive branch, should have no role in sentencing, an obvious judicial function. [End Text]

However, we think that the statute may reasonably be interpreted in a way that makes it clear it does not infringe on the judiciary's role.

[Text] On this reconsideration, we find that the statute can reasonably be interpreted as permitting suspension/ reduction of sentence in instances other than where the district attorney so moves.

Basically, La.R.S. 40:967(E)-(F) provides for substantial minimum jail sentences for the knowing or intentional possession of large quantities of marijuana or cocaine. Subsection (G)(1) of the statute mandates that these jail terms shall not be suspended, deferred or withheld, nor shall the convicted defendant be eligible for probation or parole prior to serving the minimum sentence, except as provided in La.R.S. 40:967(G)(2). That portion of the statute [subsection (G)(2)] consists of three sentences. The first sentence provides that the district attorney may move the sentencing court to reduce or suspend the sentence of persons to whom the provisions of (E) and/or (F) are applicable if such persons provide substantial assistance in the identification, arrest or conviction of other parties or conspirators to the crime for which they were convicted or to related crimes. A second sentence gives the arresting agency an opportunity to be heard with reference to any reduction or suspension. The third sentence states that the court may reduce or suspend the sentence if it finds that the defendant has rendered substantial assistance. Certainly, one reasonable interpretation would be that, primarily because of the order in which the sentences appear, the district attorney must first exercise his discretion to move for a reduction or suspension before the court is afforded any discretion to reduce or suspend sentence. This is the interpretation expoused by defendants at bar. However, that interpretation is not the only reasonable one that can be given to Subsection (G)(2).

Another reasonable interpretation is that the court is very specifically given the discretion to reduce or suspend sentence if it finds that the defendant has rendered substantial assistance, etc. Although there also appears a specific provision for the district attorney to so move, the court's discretion and authority under this interpretation is express and not conditional. Since the court has the discretion to reduce or suspend sentence when the defendant has met the requirements of the statute, the court may do so on its own motion, or its ruling may be triggered by motion of either the district attorney or the defendant.

We interpret the statute in accordance with the preceding paragraph and in so doing obviate a constitutional separation of powers problem. Under our interpretation, there is no exclusive authority in the district attorney and there is thus no invasion of the judge's sentencing powers. The statute is therefore constitutional. [End Text]--Calogero, J.

Dissent: [Text] I respectfully dissent, believing R.S. 40:967(G) does not authorize the exercise of the judicial power by the district attorney, and therefore does not violate the doctrine of separation of powers. The provisions for unlimited fines are probably unconstitutional on the face of the statute. [End Text]--Dixon, C.J. and Blanche, J.

Dissent: [Text] Since the final or ultimate decision to reduce or suspend the sentence rests with the court and not the district attorney, I do not consider that the statute in question violates the constitutional requirement of separation of powers. Moreover, I disagree with the interpretation of the statute by the majority. Accordingly, I respectfully dissent. [End Text]--Marcus, J.

(State v. LeCompte; La.Sup.Ct., 11/16/81; on rehearing of 29 CrL.2259)

APPENDIX J

The Gainesville Sun April 7, 1979, 1-A, cl. 1

"Graham Signs Stiff Drug Bill Into Law"

TALLAHASSEE (AP)--Gov. Bob Graham won his first legislative contest on Friday as the House unanimously approved his plan for cracking down on Florida's notorious drug business by imposing stiff sentences on traffickers.

Graham put his signature on the bill just two hours after the House voted 116-0 for a get-touch-on-drugs proposal (SB 83) that had sailed through the Senate the day before.

"If people want to be involved in the drug traffic, they'd better do it someplace else than Florida," Graham told reporters shortly after he signed the bill.

"This is a very visible action in

our commitment to fight organized crime."

The measure became the first new law to result from the 1979 session which began on TUESDAY. It also was the first legislation signed by Graham since he became governor in January.

House Speaker Hyatt Brown told reporters at a news conference later in the day that Graham had appealed to legislative leaders to pass the bill quickly because of an "overriding need" to have it on the books before next week.

Brown refused to explain but hinted that the governor might have occasion to use the statute in the near future.

The new law hopes to cut down on the huge amounts of illegal drugs smuggled into the state from South America and Mexico by making it easier for law enforcement officials to win more conviction of drug-smuggling master-minds.

The law will establish a sliding scale of minimum mandatory prison sentence ranging from three years to 25 years for persons convicted of trafficking in large quantities of marijuana, cocaine or hard drugs such as heroin.

The only way such convicted felons could escape the mandatory sentence would be to turn state's evidence--cooperate with law enforcement officials trying to indict higher-ups in the drug-smuggling world.

Supporters have said they hope the opportunity to escape from the mandatory sentence will convince some convicted drug smugglers to turn state's evidence on their underworld bosses.

Supporters also have said the law will help to counteract the embarrassing national publicity Florida has received about its estimated $5-billion-a-year drug-trafficking industry.

"Today we have an opportunity to drop a bombshell in the minds of the drug-smuggling business in Florida and the United States," said House Criminal Justice Chairman Robert Crawford, D-Winter Haven.

"We're sending out a pretty strong word to drug traffickers that if you get caught involved in it, we're going to get to you."

APPENDIX K

The Gainesville Sun, 19 October 1979

GRAHAM SAYS GET-TOUCH DRUG LAW IS WORKING

SARASOTA (AP)--Gov. Bob Graham said Thursday that Florida's new get-touch drug law, tossed out by five judges but upheld by four other, already is helping the state rid itself of big-time drug traffickers.

"We're in for a long, touch fight to rid our state of drug traffickers, but we've already made some inroads," Graham said in remarks prepared for a speech to the Florida State Attorneys Association. "We're beginning to see results already from our minimum mandatory sentencing law."

However, Graham didn't say what those results were. He only said that some Georgia officials had expressed an interest in the controversial measure because drug smugglers "apparently are fleeing Florida" and moving into other states.

In Tallahassee, the governor's staff said the only indication they had about the law's effects was the assertion by some Georgia and federal officials that the smugglers are setting up shop in other states. They acknowledged no statistical data have been compiled yet on how the controversial new law is working.

"It's premature for that to be available because the cases have to move through the courts," said Graham aide Jill Chamberlin.

Graham was the chief proponent of the new law, which was rushed through the Legislature in two days last session after the CBS-TV program "60 Minutes" ran a 15-minute segment highlighting Florida's status as the nation's major entryway for drug smugglers.

The law requires three-to-25-year prison sentences for drug traffickers who are caught with more than 100 pounds of marijuana or 28 grams of cocaine. Prosecutors may arrange for defendants to get lighter sentences if they help the state get other smugglers.

The measure has been declared invalid by five trial judge in Dade and Broward counties but has been upheld by four others. It now goes directly to the Florida Supreme Court for a ruling on its validity.

"We expected to meet a constitutional challenge of this nature and we welcome the opportunity to vindicate the principles of the law in the Florida Supreme Court."

APPENDIX L

March 30, 1979

SB 83
HB 1506 by the Committee on Criminal Justice

Provides for minimum mandatory penalties for drug trafficking.

Other Committees of Reference
None

I. Statement of the Problem

Drug trafficking has become a major problem for law enforcement in the State of Florida. The profits are extremely high and the risks are relatively low.

II. Fiscal Impact

See attached fiscal note.

III. Comments

A. Discussion

The bill provides for a class of drug offenses designated as "trafficking." The bill provides for a graduated scale of minimum mandatory term of imprisonment and fine on persons convicted of trafficking in cannabis, cocaine or heroin. The bill contains a provision which allows the offender to "hold the key to the jail", by providing that the sentence can be reduced or suspended if the offender cooperates with the law enforcement. The bill would place the penalties on the suppliers.

B. Constitutionality
The bill appears to be constitutional.

C. Legislative intent
Adequately expressed.

IV. Amendments

EXHIBIT A

BILL SUMMARY - PCB #16

Amounts

Cannabis	Present Penalty
100 lbs.	Poss/Sale-15 yrs/$10,000
2,000 lbs.	" " "
10,000 lbs.	" " "

Proposed Penalty

15 yrs (3 yr Min)	$ 25,000
15 yrs (5 yr min)	$ 50,000
15 yr minimum	$200,000

Cocaine	Present Penalty
1 oz. (28 gr)	Poss/Sale-30 yrs/$10,000
1/2 lb.	" " "
1 lb.	" " "

Proposed Penalty

30 yrs (3 yr min)	$ 50,000
30 yrs (5 yr Min)	$100,000
30 yrs (15 yr min)	$250,000

Heroin

0.15 oz. (4gr)	Poss Sale-	15 yrs/$10,000
0.5 oz. (14 gr)	"	30 yrs/$10,000
1 oz. (28 gr)	"	30 yrs/$10,000

15 yrs (3 yr min)	$ 50,000
30 yrs(10 yr min)	$100,000
30 yrs(25 yr min)	$500,000

APPENDIX M

BEFORE THE
HOUSE OF REPRESENTATIVES
COMMITTEE ON CRIMINAL JUSTICE
AT
THE CAPITOL
TALLAHASSEE, FLORIDA
APRIL 3, 1979

IN RE
PROPOSED COMMITTEE BILL 16

PROCEEDINGS

MR. CHAIRMAN: All right, a quorum being present, let's take up the proposed committee bill on drug smuggling which is entitled, what? Number 16. Question.

VOICE: Mr. Chairman, do we plan to vote this either up or down?

MR. CHAIRMAN: Yes, we do. All right, let me just for the sake of relieving some confusion, make sure that you have in your hands Proposed Committee Bill Number 16. We have some others around that are different drafts-we have a Senate draft around and we are going to try to go with a House bill, Proposed Committee Bill Number 16. Let me just briefly explain what we're talking about here. We're approaching the drug smuggling problem from two standpoints: number one, we are going to apply a minimum mandatory sentence on people caught in the activity of trafficking in drugs; number two, we're also going to try to give law enforcement and prosecution the leverage to get at higher echelon financiers of these operations by giving them the tool of offering reduced sentences of those people after convictions, if they will cooperate and help convict people who are their accessories. Now, that is a two-pronged approach. At this point, I think we have a couple of people who would like to speak on behalf of the bill. First, let me call Representative Ralph Haben before the Committee, who is our illustrious Rules chairman, former chairman of this committee. I think he might like to make a couple of comments.

REPRESENTATIVE HABEN: Mr. Chairman, I appreciate it. Ordinarily, I would not come down, but the reason I've done so is that I think I need to explain to the Committee something.

I am still opposed to mandatory minimum sentencing. Now, I won't go into all the reasons why I am, and so therefore I felt obligated to come down and explain to you why I'm supporting this particular measure.

Mainly, I'm supporting it because General Counsel for the Governor and and the Director of the Department of Criminal Law Enforcement closed the door on the Governor's jet, and said if I didn't support it they wouldn't let on.

Seriously, though, I see, I think, a

distinction between this concept and mandatory minimums across the board. The reason I'm opposed to starting with mandatory minimums, if you say mandatory minimum for robbery, what then do you say to the person who's committed murder, and then how do you say we can't have mandatory minimum for assault on an old person? In other words, if you are going to do it, you have to go across the board. Therefore, let me distinguish this, I think, example: drug smuggling, and what the Governor is trying to get at involves, obviously, a conspiracy. If you have a conspiracy, that is the most difficult of crimes to prove, I think; as Assistant State Attorney, I can tell you, it is tough to prove. I've defended conspiracy cases, and every one of those defendants, the jury was back in five minutes, turning them loose. Conspiracy is hard to prove.

So therefore, I think the Governor has come up with an (inaudible) that I can support. Two reasons: number one, you're dealing with a crime that involves a conspiracy and it is necessary to have testimony where one party to the conspiracy turns state's evidence, so that you can ultimately convict the person that financed the operation. In addition to that, I think this is not a pure mandatory minimum. It is a mandatory minimum if you are caught and convicted or enter a plea and choose not to aid and assist law enforcement. And I think it's going to work because right now, if a pilot or a courier is arrested, what he'll do, he'll spend two to three years in Raiford, at two or three hundred thousand dollars a year, because it's profitable for him to stay in jail. If you told him it's going to be fifteen years in Raiford without gain time, without a possibility of parole or probation, he's not going to spend fifteen years in Raiford, he's going to turn state's evidence. So, I think because of the fact that there is a way out, it is not a pure mandatory minimum on one hand and number two, because it involves a crime that of necessity must be a conspiracy, I both heartily endorse and support the concept. Thank you, Mr. Chairman.

MR. CHAIRMAN: Thank you, Mr. Chairman.

REPRESENTATIVE MARTINEZ: Mr. Chairman.

MR. CHAIRMAN: Representative Martinez.

VOICE: Ralph, I have one question.

Would the gentleman yield?

REPRESENTATIVE MARTINEZ: Sure.

VOICE: Is this built-in statutory plea-bargaining?

REPRESENTATIVE HABEN: We hope so. We hope so, because that's really what we're talking about. I think you've got to also dovetail this concept with the fact-the one thing I liked the most about the Governor's address this morning, he's willing to put his money where his mouth is. For six years I've been a voice in the wilderness, saying we've got to put more funds into the law enforcement program, and he has said all right, that's precisely what we're going to do. And I think you're going to get plea-bargaining, I hope you do, because if you get that, you'll get the testimony against somebody who finances the operation.

MR. CHAIRMAN: Further questions?

REPRESENTATIVE EASLEY: Mr. Chairman?

MR. CHAIRMAN: Mrs. Easley.

REPRESENTATIVE EASLEY: I just have one, on the section which does permit a judge to --

VOICE: Reduce or suspend it.

REPRESENTATIVE EASLEY: Yes, but it must be filed -- I can't tell, it says whenever a person is convicted or imprisoned for violation, does that go all the way through and he has to have received a sentence, or is this prior to sentencing, or both?

VOICE: That is, as I understand it, it would be after the conviction. Prior to sentencing or after sentencing.

REPRESENTATIVE EASLEY: Or after sentencing?

VOICE: Right

REPRESENTATIVE EASLEY: If it's prior to, have we only changed the jail time -- what I'm getting at, is the guy going to have to pay that fine regardless? I'd kind of like to make it also not profitable. If he's in prison, I assume he's not going to have his fine returned.

VOICE: Well, the way it is there, it gives the judge the opportunity to do both. He can suspend the jail time, or suspend the fine, or suspend a portion of the fine, or a portion of the jail time.

If he's in prison --
I assume he's not going to have his fine returned.

VOICE: Well, the way it is there, it gives the judge the opportunity to do both. He can suspend the jail time, or suspend the fine, or suspend a portion of the fine, or a portion of the jail time.

If he's in prison --

REPRESENTATIVE EASLEY: So it's up to the judge?

VOICE: Yes. Yes, because that's what the bill entails, because the judge is going to suspend part of that jail time.

REPRESENTATIVE EASLEY: Would somebody tell me -- I don't have any other reaction than just, I don't know whether we want to do that or not.

MR. CHAIRMAN: Well, I think first of all, the State Attorney has to ask for it, and the judge has to approve it, and law enforcement is going to be involved with it, too, so I think if it's done, it's going to be appropriate.

REPRESENTATIVE EASLEY: Okay.

MR. CHAIRMAN: Representative Sample.

REPRESENTATIVE SAMPLE: Did I have a

question on my face? I'm kind of concerned about why we call this mandatory. It looks like everything but.

MR. CHAIRMAN: Well, I think that it's mandatory, and it's minimum -- the concepts have different meanings in this bill. It is mandatory if they fall into this category to get it. If they do not cooperate, if the State Attorney does not petition, it is mandatory that the court impose that, so it is mandatory on the judge. He can only be relieved by petition from the State Attorney.

REPRESENTATIVE SAMPLE: All right, is this mandatory if they don't cooperate? Are we going to have to add some more specificity to what is cooperation, or are we just going to spell it out and say if you don't squeal?

MR. CHAIRMAN: Representative Fontana.

REPRESENTATIVE FONTANA: Well, I have only one question to ask staff concerning -- in discussing this with Mr. Haben, where in the statute do they define the word "substantial"?

VOICE: We can define it if you want. You can define -- you know, but it is going to be questionable --

REPRESENTATIVE HABEN: Mr. Chairman, can I respond to that?

MR. CHAIRMAN: Representative Haben.

REPRESENTATIVE HABEN: Representative Fontana, I raised that, because I started reading it first of all as a defense lawyer, and what could I do, you know, to get around that, but I'm afraid if you try to define what substantial is, you're going to open the box of information leading to a conviction, which is going to give you a problem, because what if the guy really does what he is supposed to do and turns state's evidence and, for one reason or another, you end up with a hung jury, or you lose a witness during the trial, and you end up with a mistrial or the State Attorney feels that he can't press on, and the conviction doesn't occur, than you haven't satisfied the statute. So it seems to me that, even though it would be desirable to give some degree of specificity, I think if you try to do it, I think you get into a box you can't get back out of. It would be nice to do it, but if we do it, I think we're going to probably overload it.

MR. CHAIRMAN: Very well. Representative Smith.

REPRESENTATIVE SMITH; I'm kind of concerned about this thing, too, in that, as I understand, the money people are pretty well insulated. And the fellow we're going to catch, how much do you think he can possibly give, and -- plea-bargaining is one thing, but I just don't -- I tend to think that maybe this is more of a deterrent-type thing, personally, than it will be for anything that we can glean from this guy in terms of getting the money people.

MR. CHAIRMAN: I agree. I think it has a two-pronged effect. If you can't get it from one standpoint, it has a deterrent effect from the other standpoint. Representative Martinez.

REPRESENTATIVE MARTINEZ: Mr. Chairman, if I may, I like the concept, and I am trying to be constructive about it but you already have a tool, and that's immunity. The State Attorney can give immunity to anyone, and I think the substantial aspect of this thing is a key that might work against us. I've defended too many of these cases, and it's usually the mule, the guy that's unloading the ship, or the guy who happens to be driving the truck. The financier is the one we're trying to get. If a guy is driving a truck for someone who he doesn't know, and he's getting paid by someone else, that's as far as he can go. I think that the word "substantial" here, the way it is written, it's not a judicial question, because first of all, the State Attorney has to be convinced that it's substantial and the State Attorney has to file the petition, and the defendant doesn't have anything. He's making a deal and buying a pig in a poke, at this point. And I think if we're going to have a mechanism to determine whether the guy really helped or not, that that point there should be an adversary proceeding rather than leave it up to the State Attorney. If the State Attorney doesn't file it before this comes into play, these are the problems I see with it. The man has to already have been convicted. That means the judge has to have him before him and say, I hereby find you guilty of this offense. He's through with the judicial process at that point. The only thing the judge can do is set sentencing further on, but he's got to find him guilty. You've already made him a felon, which is all right with me, if the guy wants to do it, but at that point, he's completely out of the picture. His attorney can't come up and say, hey, Court, now look, that's all the man knows. He's out of the picture. It's just the State Attorney and the law enforcement, and if the Law enforcement, if a detective has a particular gripe against this guy, or the guy made a fool of him before, and didn't catch him, and the policeman wants this guy to go away for fifteen years, it doesn't matter what the State Attorney is going to say, that policeman can come in and tell them, this guy shouldn't go anywhere. He should go to jail for fifteen years, and he knows who the top man is, but the defendant is there, really -- there is really no inducement for him to do anything because he's not guaranteed anything. The State Attorney can give him immunity and then he's free from everything. The intent of this bill is not going to make him free of anything. Let's say he talks. If I'm a defendant, I'm representing him, and I say, look, they've given me this deal and if I talk, after I get convicted, I can get out of the fifteen years. Well, what if they're not satisfied? You've lost me at that point. Now if I get convicted, I can't go in and I can't initiate a condition, and if the judge doesn't buy it, and if the officer doesn't like you, you're going to jail with the same guys you helped convict. So I'd think about it twice. I think, really, the word "substantial", it's not even clear. The judge may have some hangups as to how far it should go. The concept is great, but unless you give that defendant something to go on so that he can at least show the court, look, all I did was drive the truck and John Brown was the one that was supposed to pay me, and John Brown told me that his boss was going to have to bring him the money first. So who's his boss? I don't know. Oh, yes, you know, you just don't want to tell us, you haven't given us any help.

I bet that the intent might have been, and I think this might help the bill, and I throw it out just to think about -- if, when we're talking on the last page, page 4, whenever a person is convicted or imprisoned, that refers to the guy doing the talking. He's got to be convicted or imprisoned. I think, really, if you want to get at the high level, then let that conviction be of the one he ratted on. If his testimony is good enough to convict him, the guy over him, then he's entitled to this, you see what I mean?

MR. CHAIRMAN: Let me see this right quick-like. We have some representatives of the Governor's office here, and I think we have Ed Blackburn, Robin Gibson and Jim White, and so, in any order that you's like to speak, I think we ought to give all of them a chance.

MR. BLACKBURN: Well, Mr. Chairman, if I might, I'd like to respond to what

Mr. Martinez had to say. Incidentally, I don't know the ground rules, Mr. Chairman. This is the first time I've ever appeared as an adversary to Mr. Martinez when he was a voting member and I wasn't. This does put me at somewhat of a handicap. We used to have some delightful -- on the floor -- and incidentally, he was a client of mine in the life insurance business, in which he paid his premium every month, that was drafted out of his bank account. We had some serious controversy one day on a bill and he sat right behind me; he tapped me on the shoulder and said, "If you don't stop that position, I'm going to cancel that contract. It'll cost you $3.40 a month."

RPERESENTATIVE MARTINEZ: Point of personal privilege. You know, Ed's response was, "If I weren't getting that

$3.40 from you every month, I'd kill you."

MR. BLACKBURN: But, with just this little bit of overview, the Federal Drug Administration says that the narcotics business in Florida brings in some $10,000,000 a day, approaching $4 billion a year, and that we don't catch, all the agencies combined, we don't catch over 10 percent of it.

Without going into what this does to, these monies do to buy into, what this does for organized crime to increase their strength, and to buy into businesses all over the state -- if I told you some of the businesses, which I can't that I know about that they have bought into, believe me, it would be frightening. They have bought into banks -- I know of five banks that they own and control in Florida -- they are in the real estate business, they've bought controlling in companies over the counter. Shopping centers, they're strong in, and their land acquisitions are spread from the Panhandle on down to central Florida.

So that's just a brief overview of that, but the points Mr. Martinez made about the defendants, you know, he'd lose this right, but, really I'm not near as concerned about the defendant as I might ought to be when we see what they're doing to this state. What we're really trying to do is to get the man at the top, but if we miss one or two along the way -- let me give you this example.

Just like four weeks ago, I believe it was, today, down at Newport, and it happened that I went down there one night, and the sheriffs of the three surrounding counties here, the sheriff from Gadsden, the sheriff from Wakulla, and the sheriff from Jefferson, were down there with the Department of Natural Resources, Customs, United States Coast Guard, and with the DEA. They had impounded a 65-foot shrimp boat. They thought when they first went in it had thirty tons on it; it only had twenty-four actual. They had three trucks, two of them worth better than $50 thousand apiece, and they had, I don't know, quite a few under arrest. We later learned that this had been brought in here from Marathon. The twenty-four tons, according to the people who figure the price of this stuff over at our agency, which is something I know nothing about, said that a minimum, when this was purchased in Columbia, this was the real good grade Colombian marijuana, said it was worth $5 million; said delivered to Marathon, it was worth ten. Whoever bought it in Marathon paid another five. But, to the point, the man who ran -- and Mr. Martinez, this is the thing that was really interesting to me -- the man, the captain of the boat readily admitted that his new contract was $50 thousand to deliver it from Marathon to Newport, just to deliver it here.

Well, with this bill law, in which he being required to serve fifteen years, and I believe the fine here is a quarter of a million dollars, the first question that comes to mind, would he have taken this contract? I'm not worried about how he's going to get out later, you know, if so and so happens but would he have taken this contract and he known that Florida had a law that states, you're going to get fifteen years and you'll have to pay a quarter of a million dollars to get out?

More interesting than that, would the man that, (inaudible) in Marathon, who had made the deal with him, would he have hired this fellow to deliver it here had he known that if that fellow delivered it there, if he squeals on me, he can get out of it?

What we're all interested in, and I know that you folks are, is getting the people at the top of this ladder. For whatever my beliefs are worth, I think you've got to make it just as tough as you can on that man at the bottom to get the man at the top. I believe this: I believe that this Legislature will pass this bill. It'll advertise to the world that Florida ain't the place to come. And I think you'll reduce the proportion of this stuff coming in here overnight.

That winds me up.

MR. CHAIRMAN: Tony.

REPRESENTATIVE FONTANA: Let me ask you a question Sheriff. You know, I'm for the bill, but let's put it in another -- let's reverse it all a little bit. Let's say that you, Sheriff Blackburn, is the person with the money. Now, Haben has a license that, he flies, so it so happens that Mr. Haben feels one time that he needs some cash. So he's going to take that one shot, and he's going to fly that cargo somewhere, okay? Wasn't sure he's going to get his money, he didn't get caught. The other fellow with the money, what about later on when you get picked up, and you say, well, okay, now, I'm going to come under this statute because I'm goinq to tell you who flew so many tons of marijuana, whatever, into this airport or whatever. You have the same right, then, to go to the State's

Attorney and start saying, well, now look, I know that Ralph Haben flies, I know that, and I can prove to you that on December 2nd he flew ten tons of marijuana to anywhere. That gives you the same right -- you're the fellow that's putting up the money, now -- to go ahead and rat out on Mr. Haben and send him away.

MR. BLACKBURN: When he wasn't a part of the same deal, is that your point?

REPRESENTATIVE FONTANA: Right. He's moving marijuana, he moved it once, that's all.

MR. BLACKBURN: Well, I think the State's Attorney, under present law, has the authority to do that, without this statute. I believe that he has. I believe that the State's Attorney, right now -- let's say, let's forget this bill.

That anybody that's charged with a crime, if you were to go to the State Attorney today and say, you know, if you'll go easy on me on this one -- you've done it, you've done it, too, in -- Sheriff (inaudible), you've done it in burglary cases. If they'll give you evidence on somebody else, on a bigger one, I bet you that you'd stop back and think -- we've all done it in law enforcement.

REPRESENTATIVE FONTANA: But you haven't answered the question. How do you get the man with the money if he goes up and he tells them, tells the State's Attorney about how it's being transported and who's involved? Do you understand what I'm saying?

MR. BLACKBURN: Maybe all you catch is the man at the bottom. Maybe all you catch is the man -- I'm not concerned with the defendant that will bring these drugs in here. This bill doesn't only talk about marijuana. It talks about heroin, cocaine, morphine, the rest of them. I'm really not as concerned about their rights as perhaps I should be. I'm thinking about what they're doing to this state. Last year -- what they're doing to our children. Last year in Florida alone, under the age of twenty-five, over twenty-five thousand young people were charged with narcotics violations. I want to stop these people that are bringing in here, stuff. And if some of them lose, are imprisoned along the way, that's just too bad.

MR. CHAIRMAN: Let me, before we have any further questions, let me ask Robin Gibson, if he would, to make a few remarks, and then, at that point, we'll ask some more questions and discuss it. Robin Gibson is with the Governor's office.

MR. GIBSON?: I want to make a couple of remarks. I also want to make an introduction of Jim White.

First off, the bill is designed not to get the mule, but to get the thoroughbred. It can be interpreted to where you can go up or down the ladder, but the information has to be substantial enough to warrant the State Attorney's filing his petition, and thereafter, consideration by the judge.

I'd recommend that the language of the statute stay as it is. If we had a particular case before us, if we knew what the facts in that case were, we could collectively decide what the best thing to do was. But we don't have the facts of a particular case before us. We have to give the authority to the State Attorney, who has the facts of that particular case before him, and trust in the good judgment of the judge who has the facts of that case before him. We would be doing ourselves a disservice, I think, if we gave our Law enforcement people the tools, and then by adding restrictions or making requirements on how these tools would be used, we'd, in effect, be tying one hand behind their backs, and the tools would be laying out in front of them.

We should give them the maximum discretion to determine what substantial assistance is. Like Sheriff Blackburn says, if they determine that that piece of information is not adequate, I'm not sorry for them, either. It's just not substantial enough to warrant getting out of a prison sentence of this kind for an offense of this kind.

But unless we knew what the

particular facts of the case were, we'd better leave that up to the decision of the people who have the facts of that case in front of them.

The unique quality of the crime with which we are faced is that number one, it's an economic crime, and number two, it involves a network. This statute is aimed at economic aspects of that crime, by, one, imposing stiff fines, and by, two, going after the people who have the money, and that are at the top of the structure. And since it is kind of a network, it requires, as Mr. Haben is talking about, it requires a method by which you can go step by step up the ladder of this conspiracy. Like Sheriff Blackburn says, it has two effects. We're just here talking about the practical effects, now, a real case. But, as the Sheriff talks about the symbolic effects we need the statute in its present form so that it will have both the practical strength and the symbolic strength that the statute has to offer.

Jim White is the Assistant General Counsel in our office, who is in charge of law enforcement matters. Jim has tried a number of these cases himself. He and Sonny Palomino have worked together on the drafting of this statute, and I'd like to introduce him for his comments. He can explain the provisions of the statute, and field some questions on it. I, in closing, I would just simply say that, on behalf of the Governor, that he has recognized what we all know: that is, that this is a unique problem that is at our doorstep.

We have a national problem on our hands. We just happen to be the gateway for it, and a unique problem requires a unique solution. This statute is a unique statute, and it is something that would be new and different and of material assistance to law enforcement agencies in our state, and we need it. Jim.

MR. CHAIRMAN: Before we hear, any questions about this? Representative Lehman.

REPRESENTATIVE LEHMAN: I want to ask one question. Can anybody give me any indication on how much violence has been involved in these large hauls of drugs?

MR. WHITE; Mr. Chairman, members of the Committee, I appreciate the comments. We worked with regard to building this bill around the format that Mr. Gibson and Representative Haben and our executive director, Sheriff Blackburn, have indicated.

The problem is, however, in dealing with these people, that they have us covered (inaudible). Having handled cases like this, you're exactly right; the people that you catch at the dock, the people that you catch at the airport, the landing facility, are all mules. They're people that are working for somebody else. Most of the time, they know who they're working for, because people don't put $5 million worth of drugs in their hands, and not have some tie to them and know where they're going and know who they are.

They will represent to you many times that they don't know who they are working for. But I think logic will explain that they have got to have some contact between them and the man with the money, the man that's controlling the operation. These people are the beginning point.

At the stage of the proceedings we have now, with plea-bargaining in -- with the tools that we have for plea-bargaining right now, most of these people are assured that if they max out, if they get five years in the state penitentiary, they will do 18 months, if they do it under good time. If they do 18 months, the people in charge explain to them that you will be paid a minimum of $50 thousand dollars a year, your family will be taken care of, and when you get back out, you will have a job. All you have to do is keep your mouth shut.

On the other hand, if you talk, you'll be visited by sounds in the night. And, consequently, we get no cooperation. I've had off-loaders tell me, I'd like to help, but I need the rest. I'm going to take the 18 months and the $100 thousand dollars, and I'm not going to help you.

On some occasions, when we've been able to keep plea-bargaining to a minimum, in a good solid, cold case, some of these people have offered some assistance to us. The experience in this assistance has been that they feel like they will tell you just enough to get out from under the heat. They don't want to tell you everything, so they'll give you just enough. The position that we have taken, and the way that we try to make whatever assurances we can, is we have their defense attorney come to us. And their defense attorney can tell you a, b, c, d, and e, we can tell you where from, we can tell you who paid us, we can tell you all these sorts of things, and we will be prepared to testify to that. If we were able to do that, and if we were able to come across, and if we were able to assit you in that fashion, could you consider that substantial assistance?

At that stage of the proceedings, we could say yes or no. Now, sometimes, substantial assistance could be a conviction. But sometimes, it may be worthwhile to the State Attorney and to the investigating agency just to have the intelligence. They may not be able to see a conviction right away. They may not even be able to use this man on the stand, because of his past criminal history. But maybe he can provide them enough probable cause for a search warrant, or enough probable cause for a wire intercept, or something of that nature. So, when Robin Gibson tells you that if we begin to tie down this thing and say, well, you have got to have a conviction, maybe the law enforcement officers at this stage of the proceedings wouldn't want to use this man for a conviction. Maybe they'd want to use him as a confidential source. Maybe they's want to use him to be present at the next time one of these smuggling operations was planned.

So, I think the other matter that I wanted to discuss briefly is, I would hesitate in turning this substantial assistance into an adversary proceeding. I would hate to be a State Attorney who, I'm planning using this particular individual to assist me, but at the same time, I know, down the road, he and I are going to be arguing, involved in an adversary proceeding as to how much his assistance was. That makes him want to pull back just a little bit.

Maybe my defense attorney can argue that if I just tell them the names, that would be sufficient. Maybe the State Attorney wants me to tell them the names, the dates, and the suppliers. Well, I'll just tell them the names, and we'll get my attorney to argue before the court that that was substantial assistance.

So we would raise, simply, as I would see it, we would raise a real controversy, that the whole time you're trying to get this person to assist you.

VOICE: Another trial.

MR. WHITE; Yes, really, you'd have a mini-trial. You'd have another trial to try whether or not that was substantial.

If that State Attorney, along with the investigating or arresting agency, can commit to you and tell you, sure, if you tell me a, b, c, d and e, or if you can do this or that, in light of the information we already have, that will be substantial. That's the way it's handled now, with immunity.

But, you see, with immunity, you have to give them all one shot or not. There's no middle of the road. This provides the State Attorney and arresting agency with a middle ground or middle of the road approach they can take.

We hope that we will -- I know Representative Haben is a pilot, so -- but I want to use him one more time, he was already used previously. But, we want to keep the one-time pilots out of the business, too. They're breaking our backs with what they're bringing in. We want to serve as a deterrent all the way to the bottom, from the bottom all the way to the top. If this bill goes at the people who are involved in trafficking, we're not talking about people who are involved in first-time use, or the people will cooperate simply on a promise, you tell us everything we want to know, and then we'll see about getting you under this program? That's what the bill says now. We will decide, we will decide after you tell us everything you want -- we want to know, we will decide then whether you come under this program or not.

What I'm trying to say is, I have no argument with that. But what inducement would it be to him, to this man, if he had no assurances whatsoever that he could strike a bargain prior to his being convicted? If he doesn't strike a bargain before he's convicted, he's going to be dead. And we all know that.

MR. WHITE: If I may respond, sir, I think it meets the same rationale as we do with immunity. It only gives us a middle ground.

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MR. WHITE: If I may respond, sir, I think it meets the same rationale as we do with immunity. It only gives us a middle ground.

In the cases that I've been involved in that have dealt with granting immunity, I never grant immunity before I know the nature, not the individual facts, but the nature of the information the defendant seeks to give me. And I think you can get this if you represented a client who could give us the names, addresses, dates, telephone numbers, and places of meeting before you told me those specifics, the representative, the defense attorney would come to me and say, listen, I can tell you the date, the time, the names of the people, where they're going to deliver and what time. Would you consider that, if I come through on those things, would you consider that substantial assistance? The State Attorney will then inform you at that stage of the proceedings yes or no. You don't have to put your pig in a poke. Just like in immunity, you know, the State Attorney doesn't put his pig in a poke. He asks you the nature of the information before he grants immunity, and if you don't provide it, you don't get immunity. And if you don't provide what you say you're going to provide for substantial assistance, then you won't get the recommendation of the State Attorney. But you will know prior to ever having your client come in and sit down and tell the State Attorney what he knows, by telling the attorney, the State Attorney the nature of the information, whether or not he would consider that substantial.

REPRESENTATIVE HABEN: Mr. Chairman, if I might, to sort of resolve some issues, there have been two or three items raised that I think, perhaps, there is an answer to, and I think Mr. White has touched on a couple of them.

Representative Fontana raised a very valid, if not objection, at least a point, and that is, what do you do if you reverse the process, if you catch the principal and the principal now says, okay, here's what I'm going to do. I am going to testify, and even though you are after me, and that's the purpose of the statute, I am going to escape liability.

I think you have got to look at one thing. If you think that you have a top man caught and convicted, you don't have to go to him and ask for any statement. You just don't interrogate, and if you don't interrogate him, he can't comply with the statute. If he doesn't comply with the statute, he can't avail himself.

Number two, as far as catching someone on the lower end of the spectrum, and if you truly believe that he does not know anything; and remember this, you know, the prosecutors still have their own devices. And it's just like everybody wonders, well why does the mandatory minimum work? Well, it works, but there are a lot of cases filed under a different section of the statute and they don't file under the mandatory minimum, do they, in the 12th Judicial Circuit? So you see, that's another way around it. But I think the largest objection goes with what Representative Martinez just raised, but let me suggest something to you, and I think Mr. White touched on it. The first time somebody turned state's evidence and the State Attorney sticks it in his ear, that word will go out, whether it be in Hillsborough County, or any other circuit in this state, and if that happens, I think no one will ever want to turn state's evidence again, and

I think that word will get out quickly enough, so that, you know, if you can't trust your State Attorney, who can you trust? But if he ever does take advantage of the information and then refuses to do this petition situation, I don't think he'll ever get to use it again, and I think by the time the press gets through with that number, I think the State Attorney is probably going to have some serious problems. And what you raise may well be valid, but I think what Mr. White says, probably, may be the better reasoned argument, because he's saying don't let us turn this into a mini-trial, because when I represent a criminal defendant, which I used to do, you went to the State Attorney and said,look, if I do, and incidentally, all these people are going to have attorneys, because with this amount of money, the syndicate or the organization is going to provide them with money, so if that be the case, they are going to be represented by very good legal counsel. So, therefore, the deal will be struck, as Mr. White suggests, between the State Attorney and the defense counsel. So, he has no objection, that's the way plea bargaining takes place right now. You don't know what you're going to get, the judge allows the State Attorney and the defense to work something out, come back, indicate what it is, there's a conviction and then there is a sentence based on what that arrangement is, so I don't--I don't think that's really going to be a problem.

MR. CHAIRMAN: Representative Smith.

REPRESENTATIVE SMITH; I would take a different tact, and I might, that there is -- does live within our society a rather liberal element. I'm concerned about the other standpoint, and it stems on the word substantial. How about the guy giving just so much data, and he gets off? And without, you know, giving us something of substance? And what is "substantial?"

MR. WHITE: If I may respond to that, first of all, the State Attorney, who is, of course, the elected representative of the law enforcement community, has to make a decision first that what he is given is substantial. Then the bill provides that the arresting agency can come in to be heard aggravation or mitigation, and they can tell the court, "No, this isn't substantial, we don't think it is," and explain their reasons. Or the state -- or they can come and tell the court, "Yes, we do think the reasons are substantial.

At that stage of the proceedings you have two people, the State Attorney and the input from the law enforcement agency, to indicate to the court whether or not they think that was substantial. If you had it so that the defense attorney could file the motion, then he could initiate the proceedings that would be before the court without the State Attorney ever passing on the substantial nature of the information, or the arresting agency ever passing on. Many times, that feeling is based on tons of intelligence information about whether or not- for criminal syndicates, all we need to topple them is that much information. In other syndicates, we may need a mountain of information to be able to topple them. So you've got to leave that decision making process with the State Attorney and with the arresting agency.

REPRESENTATIVE SMITH: Yes, so then if I understand correctly, Mr. White, if the State's Attorney suggests some kind of a leniency, the arresting agency can at that point, if they feel such stop it might there, go no further.

MR. WHITE: They can come before the court at the hearing time, and tell the court that, "We don't believe it's substantial." Now, in my past practice, the State Attorney always; and it changes, I know there is some disagreement in some circuits, but in most circuits, the State Attorneys try to work with the law enforcement agency especially in a major case, to make sure what they're doing is consistent with the intelligence that the law enforcement agency has and where they want to go. Your staff has adequately drawn in a check to even that consideration, so that if there is a gripe down there in the law enforcement community, that's going to be heard by the judge, and he can take that into consideration.

MR. CHAIRMAN: Representative Sample.

REPRESENTATIVE SAMPLE: I raised this point about what is substantial and its specificity angle, and it took off. Now, I'm not sure we've settled that, but let me change the subject, and maybe this one will take off. What makes you think that this will be a deterrent; or that is to say, what makes you think that this cannot be (end of paragraph illegible).

MR. WHITE: Well, you know that -- we have human nature to some degree. There are many of us who'd appreciate an 18-month break in our affairs, and salary during that time.

We're looking at -- if I were

working for a major supplier, for instance, and they happened to catch me, and he said 18 months, we'll look after you, everything's fine, that's one thing. But when they start talking about 15 years, and they'll look after me, we start having major problems. So, as these mandatories build up, we're talking about, for instance in marijuana, we're talking about five tons, 10,000 pounds, being a fifteen year imprisonment. All the case that I've handled have been in excess of five tons.

When we're talking about taking a person and putting them in prison for fifteen years unless they cooperate, I don't know what inducement that major supplier can make to that person to encourage him to stay in prison for fifteen years. Maybe he can try to kill him if he doesn't. But we've got that problem across the board.

REPRESENTATIVE SAMPLE: Well, isn't that going to increase that kind of threat, I guess my questions should have been.

MR. WHITE: That very well may be, and hopefully it'll decrease the number of people willing to become engaged in assisting these people in smuggling, when they realize what they're looking at.

VOICE: I have a problem in the amounts. You're going to just have a lot more small shipments coming in.

MR. WHITE: We find, right now, that the large shipments are killing us. And someone brought up the question of violence. I hope that -- let me respond to that.

In Miami, Dade County, Public Safety (inaudible) reports to us that in the last year they had 59 unsolved murders, which are rising from drug- smuggling operations. I don't know how many of you are aware or recall the Sandy Creek murders. In that case, two, well, a fourteen and fifteen-year girl and their two dates happened to accidentally drive up at a drug off-loading operation. The off-loaders, these little men that we're referring to, took them to a dark sinkhole, and shot them in the back of their heads, throwing their bodies into the sink.

Now, this is the mentality of the people that we're dealing with, from top to bottom, in these organizations. So, the propensity for violence, now, is great, in terms of toward the general public. There are placed in Florida, right now, I'll be frank with you, that I would be afraid to drive up in the late evening, if I were to run into one of these major off-loading operations.

If we can -- the big money is in the big load. And that's where the danger is right now. They might lower the amounts to try to bring them in in various --

MR. CHAIRMAN: Representative Sample.

REPRESENTATIVE SAMPLE: Sheriff Beard, may I ask you, in that case that you stipulated there, do you think had you had this bill at the time, that you could have gotten those sailors to squeal?

REPRESENTATIVE BEARD: I think it would have been a weapon that we could have used to make them talk. They have a choice in this bill, isn't that it? They either do this time, fifteen years, or they get a chance to --

REPRESENTATIVE SAMPLE: Do you think

they knew something that they could tell you?

REPRESENTATIVE BEARD: I think they did.

REPRESENTATIVE SAMPLE: And this would have produced it?

REPRESENTATIVE BEARD: Right. I don't think people that kind of property into their hands without them having direct contact with them.

REPRESENTATIVE SAMPLE: And you think this bill would have produced the information you want?

MR. CHAIRMAN: Robin Gibson.

MR. GIBSON: On a whole other item, which I think the lawyers and prosecutors among us could understand it, but as I hear the discussion I think this might be helpful.

In the system, as we go along here, there are three stages. In the third stage, we have a void and we need help, because minimum mandatory, as Mr. Haben is talking about, is counter-productive. Let's just go quickly through the three points.

At one point, the State Attorney has, before the action is filed, the option as to whether he grants immunity. He's in a good bargaining position. The court is not a factor and he can say, if you will help me convict somebody more important, I will grant you immunity. He has that power at that point, right then. Then he can grant the immunity. We're in good shape on that level.

The next level, the action is filed, and it is before sentencing. At that point, there, the State Attorney can say, well, this action has been filed against you, it's now up to the court to sentence you. The best I can do for you now is, if you want to give me information to help me with somebody else, is point this up as a mitigating circumstance to the judge, and recommend a reduced sentence for you. And that's done upon many occasions, and is extremely helpful, and we have the machinery for that.

Now, the conviction has occurred, and the sentence has been pronounced. And the man goes off to jail. This is what the big man really wants, because he's been taken out of the system, and he can't hurt him anymore. We have a void, now. There's no way to reach him. All we're dealing with these people now is with the Parole and Probation Commission; are they good people in jail? And lots of times, of course, they're wonderful people in jail. All kinds have been sentence to get out.

So, they're model prisoners, and we

have just, with a minimum mandatory that Mr. Haben is talking about, we have just done exactly what the higher-ups would like to do; we have put these people off in jail, away from where they can hurt the people off in jail, away from where they can hurt the people that are higher up.

Now, this bill comes in, and fills this void. It says that, and gives us a new tool, and it says if you're in jail, and when the steel bars close is when these people really start thinking, you're in jail now, there is a tool that didn't exist before. When the reality of this thing sets in on you for the three years to five years to ten years, and you want to cooperate, we now have a vehicle by which you can cooperate.

Many of these people are not believers until the sentence is actually pronounced, and then we would have the opportunity to take full advantage of the information these people could give us, and our system's one, two, three steps, all the way along the line, would have the strength that we need for it.

REPRESENTATIVE FONTANA: Mr. Chairman.

MR. CHAIRMAN: Representative Fontana.

REPRESENTATIVE FONTANA: I would just like to basically go along with the sheriff, Beard, as far as the bill goes itself. I think the key to the whole bill, as you just heard explained, is the conviction is already there. There's no deals made prior to the time that the person is convicted. And I think that the key to the whole bill, and to what they're trying to arrive at, is, once that man is convicted, so I agree with

Sheriff Blackburn, so bring in all the little mules. Finally, we're going to run out of mules. and, these people have got a jail term facing them, and I don't care, you know, how much money organized crime has, they can't afford to put everybody on the payroll. And I think that we ought to, at least, give the opportunity. So let's try this for a year or two. I'm sure it will show some success, one way or another. If not, we can always repeal it.

MR. CHAIRMAN: Let me -- we have one technical amendment we need to put in that the Xeroxing took some words off, on page 4, line 12, "reduce or suspend sentences", inadvertently left off by the Xerox machine. Without objection, any questions? Page 4, line 12.

VOICE: After the word "may"?

MR. CHAIRMAN: After the word "may".

REPRESENTATIVE EASLEY: Yes, what does go in there?

MR. CHAIRMAN: "Reduce or suspend the sentence."

Without objection -- any objection? Show the amendment passing without objection. Representative Smith.

REPRESENTATIVE SMITH: I'd like to bring this to the bottom line. I really would.

I'm a criminal defense attorney, and I've practiced a number of years doing that kind of work in addition to some others. I've also been involved in the PTA's, being a past president, involved in the juvenile justice system a couple of years, and I'll tell you the truth, it hurts me desperately every time I hear that people say we haven't got the funds, we haven't got the manpower, we haven't got the money to stem this ever-increasing tide. And I turn around and I see children by the hundreds hooked on drugs from cannabis all the way up.

I am not yet convinced in my own mind that cannabis either does or does not start them on the road to the more habitual and addictive drugs, but, in any event, I believe it's a link in the chain to some degree. We have a problem in my county and many other counties in this state, where children who run away, for a number of reasons, from home, wind up in the drug train because their minimal contact with social and economic circumstances prevents them from making the kind of decision that they ought to make. They either get recruited to be in it, or because of peer pressure, start in it.

We must take some stand. If we haven't got the dollars to be able to totally, as an army of law enforcement, get into the fight and beat them at their own game, we ought to take some other steps which don't cost us the money. This is a totally no-fiscal-impact type of bill, it seems to me, and I, frankly, have two children who are growing up. I'd hate like hell to have to some day look at my kid and stand him before a judge in my county, because he started smoking, and have to look at him and think that I had something that I could have done, and didn't do it, for whatever reasons I would have had.

It doesn't cost us anything. It's about time we standing toe to toe with these people and slugging it out. We have been made the laughingstock of the United States. We are the importers, in an indirect sense, because we don't have the ability to police our own borders, on the sea, especially, and whatever tools are available to us should be maintained.

Now, as an attorney, this bill wouldn't bother me at all, because, quite honestly, you make the punishment greater you make the fines greater, you're going to increase the lawyers' fees. There's nobody here that should be concerned about that, and I'm certainly not. Now, that's not meant at anybody -- I mean, as an attorney, I don't -- you know, we convict them -- if they're defended on one charge, they're defended on another charge, this is just another way of being able to get to them, and I would urge everybody around this table to say, damn it, it's about time that we really did what we have to do to get outselves out of this terrible situation we're in.

We cannot keep everybody looking at us, waiting for us to do something, while these people run rampant over us, and I'm just ready to vote on it right now.

VOICE: Mr. Chairman, move the bill.

MR. CHAIRMAN: We have a motion for the previous question. Let's take it, that order.

REPRESENTATIVE MARTINEZ: I have an amendment.

MR. CHAIRMAN: We can take up the amendment now, Representative Martinez, but the staff advises me, and I concur that it's not technically in order. I know what you're trying to do; I don't think you want it to fit.

REPRESENTATIVE MARTINEZ: Well, which bill are we talking about, Mr. Chairman?

MR. CHAIRMAN: We're talking about number 16.

REPRESENTATIVE MARTINEZ: Is that the one with the staff summary attached to it?

MR. CHAIRMAN: It's number 16. On the front page, it has to say "Proposed Committee Bill Number 16."

REPRESENTATIVE MARTINEZ: Is this it?

VOICE: That's it.

REPRESENTATIVE MARTINEZ: Look on line 7, page 4.

VOICE: Your amendment, I believe, proposes that before the words "state attorney" you insert "the defendant or the state attorney", right?

REPRESENTATIVE MARTINEZ: Right.

VOICE: Well, if you keep on reading, it says, "the defendant may take into cooperation any account." He can't take into account any of his cooperation, it's got to be the State Attorney. And by putting "the defendant or the state attorney may take into account the cooperation", it doesn't fit there.

REPRESENTATIVE MARTINEZ: Mr. Chairman, I don't want to belabor it. I just want to say one thing, if I may, if the Chairman will allow me.

Gentlemen, I think maybe my intent has been misinterpreted. I'm going to vote for the bill, there's no question about voting for the bill. But, knowing the law as I know it, I think, and the purpose of committee meetings is so that we can all discuss these things. If the committee doesn't want to go into it, it's fine with me. I'm going to vote for the bill, regardless of however it goes. But these same people that we're talking about, all this money, the first that anyone has this applied to him doesn't get what he wants, you're going to have a challenge of this bill, and money's not going to be an object, and the tool which you seek so vehemently, and I agree with you, I think it's an excellent concept, but I just personally feel that there's no one that can count on this bill doing what it thinks it's going to do without giving some assurance to the defendant that if he's going to cop out, he's going to have an opportunity to show that he did the best he could, because his life is going to be on the line. I'd rather spend 15 years in jail than be found in some Dade County-in the trunk of some airport, four or five days after my wife has missed me. And I think, when the judge sentences anyone, regardless of whether it's a plea-bargainer or not, he tells that man, you have 30 days in which to appeal this sentence, and if you think that if the guy who cooperates doesn't get what he thought he was going to get, and they slap him because the policeman said, he didn't tell us everything we wanted to know, we think he knows more, and he has no opportunity to show that he's done everything he can, you're going to have a flaw in this bill, and what we've attempted to do with this bill is going to backfire, and we're going to be right where we are now, and I suggest to the fine gentlemen to look at that aspect and, you know, I don't want to belabor it anymore, I just thought that that's what committees were for. But we'll vote on the bill, and I want to vote for the bill, but I want to caution everyone that we're -- we might be acting too hastily with going full steam ahead in our endeavor to do what's right, and leave this thing so that you've got the tool, and it's like one of these little tools I was using a clamp to fix a drawer at the house, and I turned the clamp just one more turn and it snapped, because I tightened it too much. I'm afraid that this clamp we think we're imposing will backfire, and we're going to be right back where we are, and we've lost a tool.

I don't see anything wrong with giving it some consideration, and we do have a thing known as due process. I just think that this falls a little bit short of that, and we're going to have a lot of repercussions and we're not going to really do what we think we're doing.

I like the concept, it's a good bill, and in order to satisfy my good friend Sheriff Blackburn, I'd like to have the privilege of moving the bill.

MR. CHAIRMAN: We have a motion then from Representative Martinez to move the bill. Question is now on the bill, Proposed Committee Bill number 16. The secretary will call the roll.

COMMITTEE SECRETARY: Representative Beard.

REPRESENTATIVE BEARD: Yes.

COMMITTEE SECRETARY: Representative Easley.

REPRESENTATIVE EASLEY: Yes.

COMMITTEE SECRETARY: Representative Fontana.

REPRESENTATIVE FONTANA: Yes.

COMMITTEE SECRETARY: Representative Kershaw.

REPRESENTATIVE KERSHAW: Yes.

COMMITTEE SECRETARY: Representative Martinez.

REPRESENTATIVE MARTINEZ: Yes.

COMMITTEE SECRETARY: Representative Reynolds.

REPRESENTATIVE REYNOLDS: Yes.

COMMITTEE SECRETARY: Representative Sample.

REPRESENTATIVE SAMPLE: Yes.

COMMITTEE SECRETARY: Representative Jim Smith.

REPRESENTATIVE SMITH: Yes.

COMMITTEE SECRETARY: Representative Larry Smith.

REPRESENTATIVE SMITH: Yes.

COMMITTEE SECRETARY: Representative Tygart.

REPRESENTATIVE TYGART: (no response.)

COMMITTEE SECRETARY: Representative Williams.

REPRESENTATIVE WILLIAMS: Yes.

COMMITTEE SECRETARY: Chairman Crawford.

MR. CHAIRMAN: Yes.

Okay, by your vote, the bill passes.

(Whereupon, the Committee was adjourned.)

APPENDIX N

SENATE COMMITTEE PROCEEDINGS ON SB83

PROCEEDINGS

SENATE PRESIDENT: Senator Myers, 37.

SENATOR MYERS: Yes, Mr. President, I respectfully withdraw my motion. I have determined that it would take a two-thirds vote, and it-and out of respect for the Senate, I don't want to hold up debate on this measure.

We ought to debate it and dispose of the matter one way or the other.

SENATE PRESIDENT: Senator Spicola, are there any other amendments on the desk?

SENATOR SPICOLA: Well, we have to adopt that one, I believe, Mr. President.

SENATOR SPICOLA: Right, and -

SENATOR SPICOLA: All right, there is a title amendment on the desk.

SENATE PRESIDENT: Senator Gordon,

do you want to take up - he has got an amendment to the original amendment, but it is going to have - you have to move to reconsider the vote by which it went to - by which amendment was adopted.

SENATOR GORDON: No, no. It is an amendment to the - to his amendment. We are not on third reading, but it has already been adopted, you see.

Now I can amend it. It is what is in front of us, is that right?

SENATE PRESIDENT: Oh, it is an amendment to what is non-existent.

SENATOR GORDON: I just wanted to identify where it was.

SENATE PRESIDENT: Okay. You have got the amendment. Read it.

VOICE: By Senator Gordon, on page five, line ten, insert "there is hereby appropriated the sum of $2,250,000 to increase the number of positions in the

Department of Criminal Law Enforcement by 150 to carry out the intention of the Act."

SENATOR GORDON: I have not been able-just to explain that amendment, I have not been able to get the precise figures, because the analyst on that doesn't happen to be in the office at the moment, but that is the approximate amount that the Governor asked for in his budget to go along with his program of drug law enforcement.

And I think just so we understand the implication and some direction to the sub-committee, I think it is an appropriate place to put this amendment.

SENATE PRESIDENT: Senator from the 22nd, for what purpose do you rise?

SENATOR SPICOLA: To speak in opposition to the amendment.

SENATE PRESIDENT: For what purpose

does the Senator from the 1st rise? Senator from the 22nd is recognized, then the Senator from the 1st.

SENATOR SPICOLA: Senators, I hope you realize what this is. This is a method to do indirectly what they couldn't do by the point of order that was raised earlier.

I think appropriately that that budget item ought to be considered in the budget. That is the way we have done it in the past. There is, the Governor's proposal is much broader than just drug trafficking. It deals with the whole gamut of state attorneys, FDLE, the whole law enforcement area.

And it is just a method to tie an amendment onto the bill that will, if you do adopt it, it will be then subject to a point of order and have to be referred, and it will railroad this bill, and I hope that you will see it what it is and I hope that you will vote it down.

SENATE PRESIDENT: Senator from the first.

SENATOR CHILDERS: Yes, Yes. Mr. President, and Senators, the sub-committee A, in Ways and Means, has addressed this issue, I guess, maybe for the last month, and we are committed, every member of the committee, sub-committee, which is the committee chaired by Senator Gordon, we are committed to fund the Department of Criminal Law Enforcement, the Department of Law Enforcement, a crack team that the Governor wants, whatever is necessary in order to stop the smuggling in Florida.

We don't want the reputation, but if this amendment is adopted, then it would go back to Ways and Means.

Now, the sub-committee is totally

committed to fund at whatever level is necessary, whether it is a million, or five million dollars.

The enforcement of the bill and we are going to do it. We have already tentatively put it into the budget. We have got the Department of Natural Resources with investigators for drug smuggling.

They have got in every, in every area they have got drug enforcement officers. The Game and Fish Commission is working on it. They work in conjunction with the Department of Agriculture, and then the primary agency is the Department of Criminal Law Enforcement.

That is where our effort is being used to back up that agency, that department, to give them the necessary tools that they need, the manpower to stop the drug smuggling in Florida, so we are going to do it.

It will be in the budget. No one knows exactly what it is going to require, but we are fully committed. I think every member of the sub-committee is fully committed to see that the Department of Law Enforcement is adequately funded, and that is a proper place.

SENATE PRESIDENT: Senator from the 10th, are you speaking - you were on your feet a minute ago. Do you want to speak?

SENATOR DUNN: No, sir.

SENATOR PRESIDENT: Okay, Senator from the 28th.

SENATOR CHILDERS: Mr. President, I would also like to reiterate the fact that I think everyone knows that Senator Gordon is opposed to this bill and the fact that I think he has made several efforts to legalize marijuana and I think this is just another ply to delay it and I would hope that we are to defeat the amendment.

SENATE PRESIDENT: The Senator is recognized to close.

SENATOR GORDON; No, I don't want to withdraw it. I think it is important for everybody to know the cost of this most useless of the crusades that the Governor is asking us all to embark on with him. All we are going to do is spend this much more money as you heard the sub-committee chairman say for the Department of Criminal Law Enforcement. But everybody else wants to get into the act so, we are going to give more money to the Department of Natural Resources, because they have those boats out there and airplanes and now the Game and Fish Commission want to catch the river smugglers, I guess, because they're on fresh water versus the saltwater smugglers that the Natural Resources is going to get, and work every other agency that can find its way into this act is going to join in this bonanza to pursue a totally illogical course. What impressed me about the Governor's proposal was, that he said that this is an economic crime and I know the Governor well enough and I know his knowledge of economics well enough to know that he didn't really analyze the economics of this situation. All you're going to do when you increase number of illegible people involved in law enforcement is that instead of confiscating, as is now estimated, five percent of the marijuana coming into this State maybe you will raise that to seven and one-half or ten percent. Or it it's now at ten percent you will go to twenty. So what will I do?

Let's just do a little basic course in supply and demand. The demand is out there, obviously. There are thirty or forty million Americans who are regular users of marijuana according to a variety of people who ought to know. The sponsor of the original bill, Senator Childers, pointed out that it's a five billion dollar business in the State of Florida.

So, obviously that five billion dollars is coming from people who want to buy it. The demand is out there. So when you restrict the supply by throwing two million, five million, eight million, ten million dollars at the problem, all you're going to do is those smugglers that are successful are going to charge a higher price and make more money.

So all we are doing by this business of over-regulating this illegal business is driving up the price. Much the same thing that Senator Dunn has been pointing out with the over-regulation in certain of the areas of professional occupational regulation.

You restrict the number of people who can practice, it drives the fees up, exactly the same thing here. I'm just telling you I know that for many of you, the emotional issues surrounding the question of the use of drugs and the assumption that that's where popular opinion is, leads you down a dead end path like the Governor is asking us to go. Because we think that's what is popular.

I have been talking about legalization for a long time and I've yet to receive very many critical letters from my constituents, or from anybody in the community. And, I am perfectly able to survive in a very heterogeneous community, survive politically with this kind of view. I take it simply to point out to you that I am utterly convinced that the public is far ahead of the legislature, and far ahead of the Governor in understanding marijuana use.

I am not talking about cocaine or heroin, I'm talking about marijuana. That marijuana use is as pervasive as the illegal use of whiskey, beer and wine was in 1925, or 1927 or 1929.

It is not going to be able to be controlled, and you just wasting tax payers money and creating tremendous profit for criminals and organized crime by making it more difficult so the pay-off has to be bigger and the business gets more monopolistic.

Organized crime arose in this county out of the ill profits on liquor, because they are the ones that organized the business, and they brought it together and they were able to do it in spite of any law enforcement attempts because people wanted to take a drink.

In this day and age people not only want to take a drink but a lot of them want to smoke. To try to stop them by spending eight million dollars or eighty million dollars or fining them, whatever these fines are, which incidentally don't go back to the state, but go to the local government, so there is no offset, is just sheer foolishness.

I just want you all to know speaking as, as somebody who knows something about economics and someone who is fiscally conservative, you are throwing money down the drain. You are making a fortune for people who are breaking the law.

Neither one of which are things that you would ordinarily do if it was another subject that didn't have this emotional overtone.

You would never, never throw away money like this and you would never, never turn around and consciously raise the profits of people in the illegal business.

You would never consciously assist organized crime. So, I'm asking you to do in thinking about this bill and other bills about it, is try to strip away your emotional concern and just think about it as a very simple problem. That this is what human behavior is, we may not approve of it, we may not like it, but a lot of things happen in this world that we don't approve of and we don't like that other people do approve of and do like. We can't change everybody's behavior to match our own. That's number one.

Number two, we don't want to create a situation in which the people who are doing the illegal things are making money and even making more money because of the kind of money we are spending in law enforcement to raise their prices.

That is essentially what this whole silly, emotional notion of throwing some money into law enforcement to cut down trafficking in marijuana is going to do. I think it is silly and stupid and the Governor and the people who support him in this generation is going to look awful silly in the history books. Just like, if you go back and read the actions of the prohibition people in 1920, 1925, it is absolutely hilarious when you read it. All of us are also going to look that way in the history books, ten, twenty, thirty years from now.

So, I am asking you to be rational,

put on your economic hat. Look to save the money. Use some creative restraint. Be creative in terms of changing your notion about what's to be done with marijuana. Be creative enough to see that it ought to be legalized and taxed so that we get the money. Show some restraint in expanding the bureaucracy in Law Enforcement, Department of Natural Resources, Fish and Game Commission, State's Attorney, Public Defenders, Departments of Correction, County Jails, Sheriffs, City Police Departments, all of those things, all you are doing is adding up the price.

Thank you Mr. President.

SENATE PRESIDENT: Senator from the 7th had a question?

SENATOR SCARBOROUGH: Mr. President, I wanted to make some remarks, I didn't realize that the Senator -

SENATE PRESIDENT: The Senator was closing. Senator Gordon was closing.

SENATE PRESIDENT: You want to-I don't want to get Senator-

SENATOR GORDON: I'll waive any further-

SENATOR SCARBOROUGH: Thank you, Senator Gordon. Thank you Mr. President.

SENATE PRESIDENT: If you think Senator Gordon - wait until Senator Gordon gets his marijuana bill up here if you think that was a speech, that was nothing. He gets really wound up in a few minutes. Go ahead Senator.

SENATOR SCARBOROUGH: Mr. President, Senators, I want to fully understand that from a personal opinion, I think that the jury is still out on the dangers of the use of marijuana. I don't advocate legalization of marijuana or any of the things Senator Gordon said, but I want to share with you for a moment some experiences that I have experienced with mandatory jail sentences.

We have many new Senators here this morning that may or may not recall that in 1968 or 1969, the Florida Legislature through a waive of emotions imposed three year mandatory jail sentences on anyone caught with any marijuana whatsoever. We thought we were doing the right thing.

President Jerry Thomas came along about two years later and took the Senate on a field trip to Apalachee Correctional Institution, a few miles west, and let us view firsthand some of the people that we had placed in the prison system for three years with no chance of parole. We were appalled at what we had done.

We recognized that by taking this latitude away from the courts, that the only thing we could do, sensibly, was to come back and repeal that particular three year mandatory jail sentence law.

It was a very difficult thing to do, because the wave of emotion throughout the United States was still very strongly against marijuana.

But the Legislature stood very tall in that hour and did what was the right thing and repealed that ridiculous three year mandatory jail sentence law.

Just a couple years ago we went through the same thing with the use of a firearm in the commission of a felony.

Now, many of us thought at that time, that that would stop or slow down or arrest many of the armed robberies that were taking place in our communities, both large and small.

I don't have any figures as to whether or not the number of armed robberies has been retained or restrained, but let me tell you what I am convinced of.

The number of unwanted, needless murders with people that are robbing stores, supermarkets, gas stations and what have you, throughout Florida, has dramatically increased.

About a mile from my home in Jacksonville, there's a small curbside market. About two or three years ago two armed robbers, about five o'clock in the afternoon entered this little establishment with .38 pistols, herded the woman of the owner, who was tending the store at the time, and a customer into the cooler after having robbed the cash register of a hundred dollars or so.

Shot both of them in the back of the head; miraculously they both lived.

It was stated at that time, by one of the people, "Leave no witnesses. With a mandatory jail sentence the best thing to do is to exterminate those right there on the spot."

We have had throughout Florida and in Jacksonville, that I can recall, many, many similar instances where human beings lives were needlessly snuffed out, because those criminals knew that if they left a witness they faced a mandatory jail sentence.

We had one within three weeks ago, a young woman, mother of small children, abducted in a 7-Eleven, two or three o'clock in the morning, needlessly murdered.

These two people were apprehended, not because of the fact that there was no witness, but the fact that someone got scared and went and told the Sheriff about it.

Now, let me tell you what concerns

me with mandatory jail sentences like this. Twenty-five years for over a thousand pounds, or whatever the case may be.

[Illegible line] is not because of one point or two point or five point million dollars for enforcement beef-up. But we will have to double the death benefits for all of our law enforcement officers in Florida. Can you imagine for one moment what will happen to an agriculture station somewhere on the highway late at night and a truckload of marijuana comes through, and that unarmed agricultural inspection officer chases him down and he's got two thousand pounds and knows if he's caught that's twenty-five years. Do you think he will hesitate for one moment to snuff out that man's life?

I submit to you they will not. I

believe that there are better ways to do what Senator from the 22nd wants to do. And as pointed out by Senator Childers, I think all of us are strongly committed to beef up our enforcement agencies, give direction and give some hard words to the courts to impose stiffer and longer sentences for those involved than it is to take away the cornerstone of one of our branches of government and say that you do not have the latitude or the intelligence to impose sentences as they should.

For those reasons and many more, Mr. President, I know that this is an emotional thing and the Senate's going to think in the eyes of the world we are doing right, but I submit to you if we do what obviously will happen here this morning, some Senate and some House in future years will come back and undo this as the result of the unwarranted slaying of many of our police officers in Florida.

SENATOR MYERS: Mr. President, purpose of my rising is a parliamentary inquiry. We've been hearing a lot of final arguments on the bill and really all that we're on now is an amendment relating to an Appropriation. I simply want to reserve some time to speak on the merits of the bill after we dispose of this amendment.

SENATE PRESIDENT: Does everybody understand the amendment of the Senator from the 35th is an amendment to increase by two million dollars in the Department of Law Enforcement.

Those in favor of the motion, signify by saying aye. Opposed "No".

Amendment is defeated. Voice by Senator Myers, on page three, line seventeen through twenty-three, strike those lines and renumber subsequent sub-sections.

SENATE PRESIDENT: Senators' recognized to explain the amendment.

SENATOR MYERS: Mr. President, Senators, this amendment strikes from the language of the bill the portion that says that the sentence, the three year mandatory minimum sentence shall not be suspended, modified, or revoked, and it allows the Judge in his discretion in case, on a case by case basis, as we do with a murderer, to determine whether there's going to be - or the Parole Commission - to determine whether there going to be a parole sometime during the three years, or probation or set forth by the Judge, initially.

What we are saying in this bill to prosecutors is, that if you use this statute, you must send the person away for mandatory minimum sentence of three years.

Prosecutors have consistently told us that mandatory minimum sentence statutes are useless, because many times they can't get juries to convict and they don't like to use them. And in all probability they will not use them. They have very seldom used the gun statute that we passed, as you see in the fiscal note here.

So, number one, it is futile to put a statute on the book that your prosecutors are reluctant to use because they don't have the right tools that we will intentioned, wanted them to use.

Second of all, it is ridiculous for us to sit here as a Parole Commission, a doctor,a psychiatrist or correctional officer, and act as a legislator, a judge and a parole commissionner or a corrections officer all in one hat in saying that we have the facility to determine when a person in prison is able to be rehabilitated or is able to provide us with certain information to lead a taxpaying citizen's life or not before the crime is even committed.

Third, you might be interested to know that we don't even provide mandatory minimum sentences for murderers, except for one where there's a twenty-five year mandatory minimum sentences for robbers, for burglars or for all the other heinous crimes you see in the books that are felons now. You don't provide mandatory minimum sentences, but yet you say you're going to provide a mandatory minimum sentence for what is commonly deemed to be a non-violent crime.

Now, Senators, lest this get to be

an argument, seemingly an argument between pro-pot-legalization and anti-marijuana people on the floor, let me just tell you, number one, that I have a great amount of respect and admiration for Senator Donald Childers and Senator Spicola, as a matter of fact I have co-sponsored a bill this season with Senator Childers to raise the drinking age back to twenty-one. (Illegible line) that bill because he wants to put it into another form, but I may pursue the bill anyway, because I strongly believe we ought to, that we were a little precipitous in lowering the drinking age when we lowered the age of majority down to eighteen. Let not this argument on this floor get into an argument between hard-line people on crime, hard-line conservative versus liberals, pro-pot versus anti-pot, because that is not the case.

Look at a criminal statute from the stand-point as to whether or not we really want to carry out, whether it will really carry out our intent and purpose and what we want to do.

If you have a law that is so rigid, that it's unusable by prosecutors or the courts, then it's counterproductive to say that you're really doing anything worthwhile in trying to stop drug smuggling.

And all of us on this floor, I believe Jack Gordon included, in spite of some adverse remarks that were made a minute ago, which I do not think were appropriate, are against crime, against drug smuggling, against drug trafficking, that's not the issue here. The issue is whether you have an appropriate workable criminal statute that our prosecutors and courts and prisons can use and that our legislature can be proud of in the future to say that we weren't just soap-boxing and making political speeches, but that we were really giving somebody a tool to enforce the law that we want to be enforced.

SENATE PRESIDENT: Senator from the 22nd for what purpose do you rise?

SENATOR SPICOLA: To oppose the amendment.

SENATE PRESIDENT: Senator from the 30th? Senator Poole.

SENATOR POOLE: I just had a question of Mr. Myers.

SENATOR SPICOLA: I yield.

SENATOR POOLE: Senator, yesterday in the committee, we had testimony on this bill, and would you believe me that the prosecutors were there represented and they were very much in favor of this bill, as well as all of law enforcement.

SENATOR MYERS: Well, no, Senator, I really don't believe that, I might believe that some prosecutors in some counties are in favor of mandatory minimum sentences, but you will find -- I've been on these committees for fifteen years -- that the prosecutors are split, and a majority of them will tell you, in appropriations and otherwise, throughout the course of the years, that they do not like mandatory minimum sentence. Mr. Gerstein, for years down in the 11th Judicial Circuit, has told us for years that he was never able to utilize well mandatory minimum sentences and he doesn't like them.

There are other prosecutors who will tell you the same thing, so you might have had some that said that, but I will tell you that there is not a unanimous opinion among prosecutors about mandatory minimum sentencing.

The mandatory minimum sentence goes two ways:

One is up front, the Judge can't put anyone on probation -- that may or may not be wise. What you are also saying is that the person cannot be paroled.

SENATE PRESIDENT: Are you finished, Senator?

SENATOR POOLE: Yes, sir.

SENATE PRESIDENT: Senator from the 36, for what purpose do you rise?

SENATOR STEINBERG: I would like to speak against the amendment.

SENATE PRESIDENT: For what purpose does Senator Dunn rise

SENATOR DUNN: Against the amendment.

SENATE PRESIDENT: Senator Spicola

recognized first - Senator from the 36th, then Senator from the 10th.

SENATOR SPICOLA: Mr. President, Senators, briefly this is just another amendment by the few on the floor here that have what I feel are not the strong prevalent view of constituents as to our drug laws that will actually in this amendment is adopted you, in effect, will go back to the existing law. And, if it's adopted, the whole concept behind this bill -- the whole idea that when this guy that pilots the boat in or pilots the plane in, that when he is apprehended and when he is sentenced to a minimum mandatory sentence, and when he hears the jail door slam shut, he will not know, if this amendment passes, he will not know that he will be in there for three years or ten years or fifteen years.

Then the whole incentive, the whole object of the bill to make him cooperate, so we can for once move from just apprehending the mules and can move up to the thoroughbreds, to apprehend the generals instead of the privates in this State, that will not be available and with this amendment there is no sense in passing this bill.

Now, under the law, and Senator Myers knows this, if this law is passed -- under this law the prosecutors still have the option of other existing drug laws and they can pick and choose, but they are given this option.

And, we did not hear from on State Attorney -- and particularly we know of the support of your present State Attorney for this bill and your present State Attorney was instrumental in all of this program that Governor Graham has now to beef up FDLE, to beef up the State Attorneys to try to do something about this drug problem.

You know, we've heard some talk about the fiscal impact. Isn't it strange, in Dade County, I'll give you one statistic, in Dade County in the last six months, there was fifty-nine murders -- that's the county that is represented by Senator Gordon and Senator Myers. Fifty-nine murders, Senators. And the Federal Drug Enforcement Administration estimates of those fifty-nine murders, over forty were drug-related.

Now, I ask you, Senators, what is the fiscal impact of human life.

Now, you think about that when you vote on this amendment and the rest of it.

Give this to the law enforcement, Senators, they are asking for it, they need it, they deserve it, and Florida can no longer be what it is today and have the reputation of what it has today as the drug capital. I urge you to defeat this amendment.

SENATE PRESIDENT: For what purpose does the Senator from the 35th? Sir, do you yield?

SENATOR SPICOLA: I yield.

SENATOR GORDON: Senator, wouldn't it make just as much sense -- if we just did a little exercise in logic here.

Wouldn't it make just as much sense to say that we wouldn't have had forty, or whatever it was -- forty of those murders, if marijuana was legalized there wouldn't be any reason for those people to shoot each other, would there? So, it seems to me your argument could be used in either direction.

SENATOR SPICOLA: Well, you could

also follow that argument, Senator, by seeing the thousands and thousands of lives, young lives, that are ruined by the use of hard drugs and other drugs, that are ruined.

And, what is the fiscal impact of those, so it could use that logic, too. If, you legalize all the drugs, as you would.

SENATE PRESIDENT: For what purpose does the Senator of the 4th rise?

SENATOR THOMAS: Point of inquiry. Will Senator Spicola yield?

SENATE PRESIDENT: Senator yield?

SENATOR SPICOLA: Yield.

SENATOR THOMAS: Senator, I want to concur with you. I don't think based on the staff analysis it would indicate to me that there's not going to be much fiscal impact on the one hand. Which would bring up the question, where does the bill really -- the statistics would indicate that some four hundred and fifty-three marijuana cases were brought into the correction system in the fiscal year of 77-78, of which of those four hundred fifty- three, ten to twenty of them were at a level of a hundred pounds or more.

Where does the bill really get to the hard-core drug traffic people?

SENATOR SPICOLA: With those few that you mentioned, those few that now may get out in a year and half, that may under this bill, sentenced to three years or ten years or fifteen years, to those that will be sentenced under this law and they know they are going to be in there that long and they know that the general is not going to finance them and guarantee them a job for that length of time, those people may get us to have those people to cooperate and get the generals that we haven't got to under our existing law.

SENATE PRESIDENT: For what purpose does the Senator from the 20th rise?

SENATOR GRIZZLE: To ask a question of --

SENATE PRESIDENT: Senator from the --

SENATOR GRIZZLE: Senator, this bill is fine, as far as it goes, but I think there is something sadly lacking. So we're going to get the privates and the lieutenants and the corporals, but what happens to the general, I mean nothing happens to the general under this bill that's bad enough.

SENATOR SPICOLA: Yes, because, if the private squeals and if that leads to the conviction of a general, he will be subject to the mandatory sentences and those are the big ones, those are the ones that the more severe penalties will apply to, because they are accessories and principals and they would be subject to the severe penalties in this bill.

SENATE PRESIDENT: Senator from the 36th recognized.

SENATOR STEINBERG: Thank you, Mr. President. I think we're -- I think Senator Spicola said most of what I would want to say, Mr. President, but I just want to go into one area.

Senator Myers is talking that we should not use the three year mandatory minimum, which is the only thing his amendment tends to strike from the bill. Without that, however, the bill does not have the effect that Law Enforcement, the State's Attorneys and Governor Graham wants the bill to have.

What you have to realize we're

dealing with other than the emotional issue, this is an economic crime.

You're talking about, in the marijuana area, a hundred pounds of marijuana. You're dealing with over a quarter of a million dollars worth of product that this person is being caught with. You're dealing with a half million dollars worth of hard drugs based on what the bill is talking about.

These people, when your dealing with that kind of numbers, have no problems today going into the criminal justice system, the mule, the person who's carrying that amount of drugs from the airport to the distribution center that is being grabbed, and sit for six months or eight months, when he has been dealing with a quarter of a million dollars.

They wouldn't earn that amount of

money on the street. In other words, economically, it's better for them to go to jail and get -- be paid when they leave jail by the person who they have been working for higher up.

What this bill is designed for, for the first time, to try to get that next run, up on the ladder. The person who is financing the person who is masterminding by saying, look, it doesn't matter that he promised you or she promised you to cover you while you're in prison. And then when you get out of prison you've got fifty or sixty thousand dollars in the bank for you. And don't worry about the time you spent, we will take care of your family, we'll give you a job when you come out. If these people feel they're not going to get out for a period of time, they're going to have to spend that time in jail, then they might go to that State Attorney and say, Look, I'll tell you who the next one up on the rung is if you'll let me out of jail.

That is what this bill does. It allows the State Attorney and law enforcement to make a deal after the person is in jail.

This is something that does not exist today in the law. Today when you find someone guilty and you sentence them to jail, after the first sixty days you no longer can make a deal with them to let them out to get them to turn state's evidence or to do anything.

This bill says, Look, we'll put you in jail mandatorily for a period of time, but if you will help us in prosecution, we can amend that mandatory jail sentence. It's a way of using the law to help law enforcement. If you take away the mandatory provision on the law, you're basically putting us back to square one in our drug enforcement.

And I am -- you know if -- most of you know, when I've been a member of the House I've supported the decriminalization of marijuana. That's not the issue here today, whether we're going to do anything with the felony or the misdemeanor question in the use of pot. That's not before us today.

We are dealing with sentences for the people who are transporting the large amount of drugs. We're not talking about the users. The user is not someone who's going to have a hundred pounds of marijuana in his possession, or he is going to have five grams of heroin or twenty-eight grams of cocaine. That's not what we are talking about. The average user is not walking around in the cocaine area. You're talking about a quarter million dollars or more of cocaine. Depending on the purity, you could be talking over a million dollars' worth. That's not the type of person we're getting at in this bill. And I think if you go with Senator Myers' amendment, you're defeating the bill. You've got to vote down the amendment, then pass the bill as now amended, and let's get the message out. You know, Hertz and Avis always talk about the number one, and one's striving to be [illegible line] we should strive not to be number one and this bill is a move in the right direction.

SENATE PRESIDENT: Senator from the 10th, Senator Dunn is recognized.

SENATOR DUNN: Mr. President, members of the Senate, I, too, would like to oppose the amendment pending and in the course of these comments address two of the principal issues of the bill itself.

First, let me agree with those Senators who have raised some question --

SENATE PRESIDENT: Can I interrupt you just a minute Senator? If your message -- we've already had time to debate the bill itself, so if you keep limited to that -- maybe you have to make your point -- statement, but we would like to limit it to just the amendment if we can. We'd like to move this along and get it out of here, if we're going to get it out.

Go ahead, Senator.

SENATOR DUNN: I would say that I agree in general principle with some of those lawyers and other senators who have raised a question about the utility of mandatory minimum sentences.

Mandatory minimum sentences have

been used in emotional frenzies by legislative bodies from time to time to address emotional problems. They have not been generally very effective in reducing crime.

There are, however, exceptions. I served under an appointment of the Chief Justice on a committee dealing with the review of Florida's sentencing code.

One of the recommendations that that committee is recommending is that Florida's sentencing process be restricted and we go to what is called a matrix system of guildelines.

Part of the review of that committee, and part of the review that our Committee on Judiciary - Criminal last year was involved in, was an analysis of the effectiveness of mandatory sentences.

Now, Senators, I reviewed a very excellent study done by Harvard Law

School on the question of the effectiveness in reducing crime by the mandatory minimum sentence provision and the Massachusetts law dealing with gun control.

One of the first scientifically done reports that I have seen on the issue, that report indicated that, yes, mandatory minimum sentences are effective. They will reduce crime if a couple of things occur.

First, if the legislative body does not overuse and apply the concept of mandatory minimums to everything that comes down the pike.

Secondly, if the legislative body and if the Governor publicizes the fact that mandatory minimums are in fact, to be imposed in certain instances, and in those cases that study indicated that in Massachusetts there was in fact a reduction in use of firearms just as we have found somewhat less so scientifically in Florida, that with our three year mandatory we have in fact, reduced, we believe, substantially, in my opinion, the use of firearms in the commission of certain felonies.

Now, I believe, that if we use sparingly, selectively, and rationally the question of mandatory minimums we can have the impact we desire, and that is to reduce crime.

Why would you use it in this instance? You would use mandatory minimums in this instance because, as has been pointed out by Senators Spicola, Steinberg, and others and very well by the Governor, we are dealing with an economic crime here.

We're not dealing with a simple question of possession of two or three grams of marijuana.

We're not dealing with a situation that occurs very frequently in this State by people who use small amounts of marijuana and consume it for their own purposes.

[Illegible line] dealing with the individuals who feed on the weakness of others.

We're dealing with the worst in society, the criminals that make their money in organized crime. And organized crime is, by definition, the organized criminal conspiracy for profit.

Now, in order to make an impact on organized crime, what we have to do is look at the causation of that economic phenomenon.

A couple of professors at John Jay University in New York wrote a good book dealing with the economic causation of crime very much in point to organized crime.

What it says, it says if you are a policy maker what you ought to be considering is how you address the causation from the point of view of the economics of it, just as Senator Gordon has pointed out, but in my opinion, quite on the other side of this issue.

They say, in effect, look at causation, look at the criminal as a rational being.

People who are in organized crime are rational, they're in it for a purpose, they're in it to make a living, and they're making substantial money.

Now, how do you cut into their business? The way you cut into their business is to look at the cost benefit analysis. So long as we permit the benefit of crime to be substantial and the cost to be insubstantial, who would not be in business if you were disposed? Who would not be able to make a profit in organized crime in this State?

I guarantee you that unless and until we increase, the cost of doing business in organized crime, we will not keep them out of the State however much money we put in organized crime repression and suppression activities in DCLE and others.

What we need to do is recognize we're got flexibility in organized crime in the criminal justice system and look at it analytically.

Number one, as has been pointed out by Senator Spicola, a person dealing in large amounts, hundred pounds of marijuana, one ounce or more of cocaine and other hard drugs can make substantial sums of money. The committee heard testimony to the effect that these mules, the people who the importers, the wholesalers, the people connected with organized crime can make two hundred thousand dollars a clip. Now if you can make two hundred thousand dollars a clip, you can run the risk of going to jail for eighteen months.

You can run the risk -- as a matter of fact, your cohorts in crime will pay you, as we heard in the testimony before the committee. They will pay you fifty thousand dollars to be quiet and stay in jail. And I guarantee if you can make two hundred thousand dollars in eighteen months, that's a pretty good risk for some of these people.

Now what do we need to do? We need to recognize that on the cost side we've got some flexibility in the system that is not perfect. We know there is sometimes a very unlikely likelihood that a person is even going to be apprehended.

The large shoreline that we have, the problems of importation, it's tough to catch anybody coming in here, trying to bring in large amounts of marijuana.

So there is a benefit and they're running the risk.

They're taking the gamble. There is a benefit that even if they are apprehended they may not likely be arrested, because of the problem in making the arrest.

After they are arrested there's some flexibility in the system, the excellent battery of lawyers, there's some likelihood that they will bet on, if you will, they they will not be prosecuted or if they are prosecuted they won't be convicted.

APPENDIX O

TRANSCRIPT: SENATE TAPE-COPY SESSION (5 APRIL, 1979 SENATE BILL 83)

"Read the next Bill

"Senate Bill 83, a Bill to be entitled, 'An Act Relating to the Possession of Controlled Substances'. . .

"Senator Childers is recognized.

"Thank you, Mr. President, Senators, this Bill was and is last year, the latter part of the Session, and at that time we did not feel it was a pressing issue to be brought before the Senate and also the fact that we did not have a House companion. I think the question that most people are asking today, is why do we need mandatory prison sentences for drug smugglers? According to a new recent news report, Florida's number one industry dollar wise, is drug smuggling. We have reports that only 10% of these drug smugglers are now being apprehended in the State of Florida. This means that there is a 90% chance of an individual, specially the big drug smugglers getting free, and making huge sums of money. There are several reasons as to why we are only apprehending only 10% of these drug smugglers; one is the lack of police manpower; the other is because we have hundreds of miles of unprotected coastlines in the State of Florida, and we have large areas where an airplane can land or either make drops of marijuana and other type of drugs; I've met with State Attorneys, law enforcement agents throughout the State, and they all agree that drug smuggling is the most major problem facing the citizens of the State of Florida today.

"I don't think we can wait until next year to do something about this. I hope that all of you that are listening now and have children in our schools and high schools and in our colleges, I have reports in Palm Beach County, that there the high school students in some high schools there are a percentage of 80 to 90% of all students that are on some type of drugs. This is tearing at the very foundation of our society not only in Florida but of the nation as a whole. We are seeking that our elected officials in Washington are not taking any action on this problem, and I think now we have a chance in Florida to move forward and make sure that this here problem is addressed. Let me just give you a few examples of what kind of money is involved. In Palm Beach County this past year I give you some of the figures on the amount of marijuana that certain law enforcement agencies were able to confiscate; 10,000 pounds; 1/2 tons; 2,000 pounds; 3,500 pounds; 4,400 pounds; 25,000 pounds; 9,200 pounds; 15,000 pounds; 98,000 pounds; 14,500 pounds; 57-1/2 tons on one vessel.

"This one vessel was confiscated with a street value in marijuana in excess of $25,000.00. In Fort Myers over the past few years there have been confiscated over 500,000 pounds of marijuana with a street value in excess of $225,000.00. The list goes on and on. I feel that if we take the appropriate action today that we will certainly reduce the amounts of drug smuggling into the State of Florida.

"All of you have on your desk a newspaper article which is in the Palm Beach Miami Herald section on Friday, March 3, 1979. The headline reads, "Police protests release of guilty pot smuggler". This top smuggler was caught with 1,400 pounds of marijuana; he is not serving one day in jail. The Judge says he is an outstanding family man and he did not want him to have a police record. We are seeing that the Courts are not acting as they should dealing with this problem. I think now we in the Legislature must come forward and do something to correct this problem.

"Senator yield?

"Yield.

"Senator, apparently you are trying to reach the problem of getting people with over 100 pounds of marijuana and a mandatory jail situation, is that correct?

"That's correct.

"I notice that the summary of the

Bill, and this is what bothers me,sir, is likely that most offenders would plead guilty to a lesser offense during the plea bargaining so the proposed Legislation would have very little, if any effect on the present population. Now, if that summary is correct what you are just saying is taking these cases out of the Court and putting them in the hands of the public defender and the Assistant Prosecutor and you are going to be sure that none of them are going to jail.

"Senator, there is going to be an Amendment offered on this Bill that will place the Governor's Bill on this Bill; I met with the Governor I met with Senator Pascola (phon.) on this yesterday afternoon and we all agree that this Bill, I think will go a long way in stopping the drug smuggling in the State of Florida.

"Will you yield to one more question, Senator?

"Yes, I would.

"Do you favor plea bargaining rather than Court actions in dealing with crimes; do you think that two guys ought to sit down and do it or do you think that a Judge or a jury ought to do it? I just wonder what your philosophy is on that . . .

"In a broad sense, I'm against plea bargaining.

"You ought to be against this Bill, then.

"Mr. President.

"What purpose does the Senator Plead?

"To inquire regarding procedure to inquire of Senator Childers.

" I yield.

"Senator you haven't indicated yet but you indicated to me earlier and I want to ask you, do you intend to offer a substitute Bill to this Bill that we've seen on our desks?

"(discussion about whether it was the one on the desks this morning - passed out to you in your office yesterday, Committee substitute for Senate Bill 620, which will be offered as an Amendment to this Bill.

"Well, as I understand it, that Bill is substantially broader than the original Bill that dealt simply with the 100 possession of 100 pounds of marijuana; this one covers a broad gamut of drugs, and in the drug scheduling Statute, and I'm simply wondering whether or not there is a fiscal note on the Committee substitute.

"This has been Ways and Means.

"It has not gone to Ways and Means, it was heard in the Criminal Justice Committee, 6/20 was, if you look at the Staff Report there is . . .

"That's the original Bill. . .

"'Economic Impact and Fiscal Note'. . .

"That was the original Bill but has there been a fiscal note running on the substitute?

"The substitute is the Committee substitute.

"Mr. President, I'm just concerned about the procedure in the Senate; we are now beginning to move a little bit too fast; I'm concerned whether or not the Senate has had a chance to look at this measure in the depth that we ought to be looking at a Committee substitute.

"Mr. President, the Committee's substitute for Senate Bill 620 is identical to the amendment that is being offered to Senator Don Childer's Bill except for the change of one word from marijuana to cannabis; and that of course has no fiscal impact; so the fiscal impact of 620 is the same as the fiscal impact for this amendment to Sen. Childers' Bill.

"What purpose does the Sen. from the 35th arise?

"To state that if the same fiscal impact applies to the proposed Committee substitute as applies to the other, then the Department of Correction estimates the fiscal impact at about $15,000,000 over a number of years, and about $5,000,000 of prison construction and I'll go on and give you the whole analysis, Mr. President, but, ah, it's related incidentally to the point that Sen. Barron raised with Sen. Childers;

the question is will they cite the Statute it's going to have that fiscal impact; if the prosecutor doesn't cite the Statute, permits them to go to County jail or something like that it will have no fiscal impact but it also will have no law enforcement impact which is what the Bill is supposed to do. So that's the fiscal situation, I'm just waiting until that Amendment comes before us to actually raise the point, but I think that it is important for the Senate, to understand that that is the fiscal situation.

"Senator, I wonder if we could get in proper posture by just reading the Amendment, and then we can discuss the fiscal impact.

"Read the Amendment so. . .

"[Reading the Amendment] - by Senators Piccola and Steinberg [phonetics], strike everything after the enacting clause and insert a lengthy amendment.

"The ---- is recognized ---- to explaining that at the time to raise a point of order Senator that's after if the Amendment is adopted; there isn't the impact at that point.

"Mr. President, Senators, this Amendment is offered with the consent of Sen. Don Childers, and if you want to follow it I believe it's on your desk; I believe it is the same I indicated earlier as a Committee substitute for Senate Bill 620 and what the Bill does is expand what Sen. Childers original concept of dealing with 100 pounds or more of marijuana; this expands the Bill to dealing with other controlled substances such as cocaine, heroin, morphine, etc., and what it does is expand that concept of minimum mandatory sentences for a new crime which is defined, as three new crimes which are actually defined in the law; one if trafficking in cannabis, the second is trafficking in cocaine, and in the third it's trafficking in illegal drugs; it provides a range of penalties based on the quantity of the drugs and the range would be from three calendar years and a fine of $50,000.00 up to a maximum well in the case of heroin to a maximum of 25 calendar years and a fine of $500,000.00.

"Now, why do we need this law? If you want to get in my opinion to the heart of the economic base of organized crime in Florida, Senators, you are going to have to get to the crime of drug trafficking and now under our present laws, there is really a void; we are at times arresting maybe the corporals, maybe the sargents but we never get to the majors, and the colonels, and never to the generals. The reason being for example somebody comes in with or is caught or the man is actually used because he can fly a plane or captain a ship and he has 100 pounds of marijuana and he comes in, he is caught, he might get sentenced to five years; he probably will be out in 18 months; on one load alone he could make from $300,000 to $500,000 of drugs or on 100 pounds of marijuana so the risks of getting caught and being in jail for a short period of time makes it worthwhile economically. Economically, all the law enforcement tells us that the very heart of organized crime is drug trafficking; the Miami Herald alone estimated that over five billion dollars a year in illegal drugs trafficking in Florida. We got the unfortunate reputation as a drug haven.

Sixty Minutes not too long ago talked about Florida that way. The reason for the Bill is to make the penalty stiff enough that that guy that flies that plane in, that pilots that boat in, and when he hears that door slam and he knows that he is going to be there for sure for 3 to 25 years, is going to make it worth his while to say who was financing the operation, where he got the money from; and I think it will contribute significantly to our drug problems, to solving our drug problem in Florida.

"We can't in Florida no longer tolerate the reputation of being a drug haven. I think that we should get this Bill passed; I hope it will be the first Bill enacted by the Florida Legislature and the word will go out throughout the world that we want to play hard ball in Florida with hard drugs so I urge you to adopt the Amendment.

"Senator from the 35th.

"Will the Senator yield for a question?

"Senator, you are a former State Attorney and you have not lost your love for that particular office, so would, how would you know anybody who was arrested would necessarily be charged under the Statute?. . .

"Since there are other Statutes under which people can be charged. . .

"We do not know that they'd be charged under the Statute, but since law enforcement almost unanimously, in fact, I know of no one in law enforcement that does not support or want this vehicle; since they want it you must assume Senator that they plan to use it. . .

"Well, couldn't you also make the assumption that since the majority or a significant number of jobs in law enforcement are there because people are going around chasing marijuana smugglers that the stronger you make the law the greater the opportunities for corruption, and the more jobs you need and the more promotions people get and everything else. Law enforcement is not necessarily just interested in enforcing the law; it's an institution like every other that may simply look for its own self-aggrandizement, don't you see that as a possible explanation for law enforcement support?

"But I don't accept that explanation, I'm sorry that you do. . .

"Well, I think Senator that you have a flawed understanding of institutional behavior, but what I want to point out to you in a question of whether they'd be charged the Department of Correction says that two out of three people who could have been charged under the Florida Statute 775.087, the gun law, were not charged under the Statute, which is why a significant number of robberies, armed robberies are not getting the mandatory jail sentence, and I just want to know in law enforcement was all in favor of that, and I want to know why law enforcement is. . .you're sure they are going to use this law and not other laws so that this law is in fact an answer. . .

"Well, you mentioned the earlier three year mandatory firearms law and you know I remember the fiscal note on that was something like $300,000,000.00 a year, and it is in fact costing us less to prosecute those kinds of armed robberies. . .

"Well, what I'm telling you, Senator, is the reason is less is that two thirds of the people who could have been prosecuted under that law are being prosecuted under the lesser law and it's not being used by the prosecutors and it's not being used by law enforcement, and I'm asking you what makes you think that the drug law is going to be any different than the gun law?

"It gives them that option; the State Attorneys are for it; it would seem that if they are going to use it; there's much more support for this Bill than I remember being for the armed robbery Bill that was quite controversial and I'm sure that if they did use it, and they did catch a lieutenant, who did cooperate that we would for the first time get a general, that would make it worth its while. When you are talking about five billion dollars a year drug trafficking in this State, and that the few tools that we have to fight that, we go after---financially in this State, you know, when they are making five billion dollars a year and what we could commit is a----to that, let's at least give them the legal tools or alternatives if you please for that....

"Senator, are you aware of the, the story . . . I'm older than you and you may not remember this, but you are aware of the historical situation in 1932 when prosecutors were saying the same thing about whiskey, and liquor and people were bring . . . the prices were lower in those days, so it was probably a five billion dollar business, but Florida was a great haven for liquor smugglers and the essential answer that came regardless of the sentence was that we made it legal and I don't know why you want to take the profits out of the situation, you don't take the analogy of Prohibition and apply it here since you are dealing primarily in marijuana with a drug that's no longer a Schedule 1 drug but is in fact a Schedule 3 drug.

"Senator, 1932 was way before my time but I also can recall or don't recall that there was a minimum mandatory sentences at that time for alcohol, illegal drug smuggling, nor was ah, any incentive at that time as provided in this Bill that if the man that was incarcerated cooperated that he would get some relief...

" . . .Senator from the 35th. . .

"To --- over again, and all those things were in the law, we had, all those, all those kind of business, it was the finest hour of the Coast Guard, that was the great expansion of the Coast Guard in this country, to hold off the smuggling by boat, we just didn't have airplanes, so we had somewhat different technological situation and I think you really ought to examine, if you want to, if, if you really want to do away with the drug smuggling, and not just raise the price of the product, which is what you are going to do here, you are going to restrict the supply, raise the price, and all you doing in this Floor is raising the profit of the people in the drug business. . .I wonder why you don't look at the alternative, as a good economist and say, why don't we simply lower the price, take the corruption out and solve the problem that way,

". . . . .on the desk. Read the Amendment.

"By Senator Thomas on page 3 of the Amendment line 21, strike the words, 'or Statutory gain time under Statute 944.

275'.

"Mr. President, Members of the Senate, I hope that the sponsor of the Bill would accept the Amendment, it goes to the heart of discipline and control and management----statutory gain time does with the prison system; one of the things that I think I should caution you on and remind you of, some three or four years ago I think that it was Sen. Williams and others visited many of the prisons and created the Prison Industries Work Program. It's somewhat geared to statutory gain time and contract parole; if you take that away, you still got a very tough Bill and even under the best conditions of statutory gain time built up the penalties are beyond and more severe than what you have now; so, Senator, I hope that you would. . .let's leave that in the Bill; that Amendment is acceptable.

"Any objection to that Amendment? Any objection?

"No objections; the Amendment is adopted. Are there Amendments?

"Any Amendments up, now? Are more?

"Any more debate on the Amendment? As amended? Any more debate? All those in favor of the Amendment vote "aye" (chorus of "ayes"); opposed? The Amendment is adopted.

"File the Amendment.

"----The Senator from the 35th has raised a point of order on this Amendment, and its precedence always do, Senator, they are very fine precedents going both ways. I think what we'll do until I get further notice will just temporarily pass this Bill and come back to it; I want to make sure when this one will ride; the, ah, we have had -----and such scholars and knowledgeable people of the Rules whose longest term in office in the Legislature today, the Senator from the 3rd, and his famous ruling, and we have others going the other way; so, you wait and I'll try to get in a ruling in--Senator Barron, Senator Johnston and Senator Ware (phon.) will give you some advise on that, I'd appreciate it.

"We'll temporarily pass that Bill, ah, come back to it.

"Senator from the 28th.

"Will we come back to this Bill today?

"We'll try to.

"Thank you.

"Senator Barron moves we temporarily pass until. . .all those in favor, say "aye" (chorus of "ayes"); opposed (silence);

read on the next Bill.

(BEGINNING OF BILL 16 - "An Act Relating to the Florida Highway Patrol Station in the City of Lakeland).

(END OF TAPE)

APPENDIX P

"GRAHAM ATTACKS LACK OF AID IN DRUG FIGHT"

THE GAINESVILLE SUN, October 10, 1981
Page 1C, cl.2

FORT LAUDERDALE (AP) -- Two top Florida officials blasted what they called Washington's indifference to the state's drug problem Friday, telling a Congressional panel that nothing short of a huge federal effort could halt the tidal wave of illegal drugs washing over the state.

Gov. Bob Graham headed a parade of state officials who told the U.S. House Select Committee on Narcotics Abuse and Control here that Florida authorities, acting alone, were powerless to halt the drug smugglers.

Graham told the committee that in 1978, the U.S. General Accounting Office estimated the illegal drug trade in South

Florida at $7 billion. Graham said drug traffickers have increased their activities in the last two years.

Such a huge flow of illegal drugs has turned South Florida into the nation's "main drug war battleground," Graham told the panel chaired by U.S. Rep. Leo Zeferetti, D-N.Y.

Graham charged the Reagan administration with paying only lip service to the fight against the importation of marijuana, cocaine and other illegal drugs.

"Although final congressional action has not been taken, a review of the latest requests from President Reagan shows that he seems bent on reducing the budgets of the main federal agencies fighting drug crimes," Graham said.

Budget cuts totaling $584.6 million proposed by Reagan for the FBI, the Drug

Enforcement Administration, federal prosecutors, the Internal Revenue Service and the U.S. Coast Guard, would leave Florida ill-equipped to deal with "the gigantic foe," Graham said.

He said it would be impossible to win the cooperation of the Columbian government in the drug war without firm financial committment from the Reagan administration. Graham called Colombian support essential since many of the drugs secreted into Florida come from Colombia.

Graham defended his record on enforcing the state's drug laws, citing the addition of 802 positions in state attorneys' office, an increase of 67 agents in the Florida Department of Law Enforcement and the addition of 108 troopers to the Florida Highway Patrol since he took office in 1978.

Legal measures--including minimum mandatory sentences for drug traffickers--have also been adopted, Graham said.

But Graham said direct federal action and heightened coordination between federal and state law enforcement agencies was necessary.

"Only when the federal government decides to join vigorously in the fight do we stand a chance at all of winning" the drug war, the governor said.

Graham and Florida Attorney General Jim Smith asked the lawmakers to push for repeal of the Percy Amendment to help foreign countries spray herbicides on marijuana crops.

Spraying, Smith said, "is analogous to destroying the enemy's ammunition. It makes a lot more sense to do it at the factory than to wait until it reaches the front line troops."

(a-250)

Spraying in Mexico had once cut marijuana imports to the U.S. from that country by 80 percent, Smith said.

APPENDIX Q

IN THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT IN AND FOR DADE
COUNTY, FLORIDA

CASE NO. 79-11741

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS COUNT II OF THE INFORMATION, AND HOLDING SECTION 893.135, FLORIDA STATUTES, TO BE UNCONSTITUTIONAL

THE STATE OF FLORIDA,
Plaintiff,

v.

JERRY JACKSON,
Defendant.

The defendant was charged in Count II of the Information in the above-styled cause with violating Section 893.135(1)(b)(1), Florida Statutes (1979), which proscribes the sale, manufacture, delivery, importation into the state, or possession of at least 28 grams, but less than 200 grams of cocaine. The Defendant filed a motion to dismiss that count, supported by a memorandum of law, based upon the Defendant's contention that Fla. Stat. §893.135, particularly section (3) of that statute, is unconstitutional. He subsequently filed an amended motion to dismiss, which raised the issue of the constitutionality of other portions of the statute. The prosecution, for its part, filed a memorandum of law, and furnished the Court and opposing counsel with copies of several cases. The Court was thus aided by research, pleadings and extensive oral argument from both parties, and therefore is fully advised of the premises. For the reasons set forth below, the motion to dismiss is granted, and Section 893.135, Florida Statutes, is held to be unconstitutional.

1. Sub-section (3) of the statute is violative of the Fifth Amendment in that it contains a penalty upon the assertion of a constitutional right, and a coercive sentencing procedure prohibited by the privilege against self-incrimination and due process of law, as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution, and Article I Section 9 of the Constitution of the State of Florida. Specifically, the statute prescribes a severe mandatory minimum sentence without parole or other mitigation unless the Defendant provides "substantial assistance" in the investigation or prosecution of others, thus unfairly conditioning the grant of a substantial benefit upon the relinquishment of the Defendant's right to remain silent, and penalizing him for the exercise of that

right. To the extent that it is unconstitutional to punish with non-criminal sanctions the exercise of the Fifth Amendment, the proposition applies with greater force in the context of a criminal prosecution. See, e.g., United States v. Jackson, 390 U.S. 570 (1968).

One such case is particularly instructive. In United States v. Rogers, 504 F.2d 1079 (5th Cir. 1974), the Court was faced with a situation strikingly similar to that created by the statute sub judice. In Rogers, the trial court had indicated its disapproval of the Defendant for not cooperating with the government in identifying his co-conspirators, and "taking the first step" towards rehabilitation. The trial judge further stated that a lesser sentence would be considered if the Defendant gave material and productive cooperation to the government. The Fifth Circuit, in vacating the Defendant's sentence, held that there was no distinction between confessing guilt and possibly implicating one own self by implicating others. Therefore, to request such assistance was as much an unconstitutional imposition upon one's right to remain silent as demanding a confession of guilt was. Accord, United States v. Acosta, 501 F.2d 1330, 1337-78 (5th Cir. 1974) (dissenting opinion of Judge Gee captioned "The Sentencing Procedure") adopted en banc. 509 F.2d 539 (5th Cir. 1975). As it was persuasively stated in United States v. Garcia, 544 F.2d 681 (3d Cir. 1976):

> The appellants were put to a Hobson's choice: remain silent and lose the opportunity to be objects of leniency, or speak and run the risk of additional prosecution. A price tag was thus placed on appell

> ants' expectations, of maximum consideration at the bar of justice. They had to waive the protection afforded them by the Fifth Amendment. This price was too high. We, therefore, cannot permit the sentence to stand.

The statute now before this Court seeks to compel information which naturally and necessarily is self-incriminatory, but it provides no co-extensive grant of immunity for those who give such "substantial assistance." Without a guarantee that compelled or coerced testimony will not be used, directly or indirectly, to further any criminal prosecution pending or which may be brought against the subject, basic precepts of our accusatorial system of justice are offended. Kastigar v. United States, 406 U.S. 441 (1972).

Notably, sub-section (3) contains no reference to plea bargaining or pleas whatsoever. It only operates once one is convicted and is being or has been sentenced. It exacts a waiver of the constitutional privilege against self-incrimination to enjoy any hope of reducing or suspending the mandatory minimum sentences the statute imposes. Such a penalty, however, is beyond the power of the Legislature to demand.

2. Sub-section (3) of the statute is unconstitutional in that its purported benefits are only available to Defendants who have accomplices or co-conspirators, and are capable of rendering substantial assistance. This has the effect of creating two classes of defendants charged with the same crime, and offering a benefit to one class while arbitrarily and capriciously denying that benefit to the other. In that there is no rational basis for this type of separate treat-

ment, the statute is violative of due process and equal protection of the laws.

Further, after reviewing the transcripts of the legislative debate which preceeded enactment of this statute, the Court is convinced that the avowed purpose of this statute is to vigorously prosecute and punish those in the upper eschelons of the drug hierarchy. The Court is equally convinced, however, that sub-section (3) is an impediment to that goal. Consider: a lowly member of a drug selling enterprise, with no knowledge of the workings of that enterprise and whose sole function is to consummate sales of drugs on the street level, if charged without accomplice or co-defendant would not be able to provide substantial assistance even if he desired to do so. He would therefore be denied any benefits of the mitigational provision of subsection (3). Conversely, the ringleader of such an enterprise, intimately familiar with all of the members and working of the enterprise, would be in a position to offer substantial assistance, and would thus be eligible for a lesser sentence. The Court therefore finds that sub-section (3) is not only unconstitutional, but it is improper.

3. Sub-section (3) of Section 893.135, Florida Statutes, violates the due process clause of the Article I, Section 9 of the Florida Constitution and of the Fifth and Fourteenth amendments to the United States Constitution, in that the term "substantial assistance" used therein is unconstitutionally vague, indefinite and uncertain so that reasonable men must guess as to its meaning. Indeed, a review of the transcripts of the Legislative proceedings reflects

numerous expressions of concern by the legislators themselves that the term substantial assistance was unworkably vague and uncertain.

In that the statute is totally devoid of guidelines by which to determine if "substantial assistance" has been rendered, such determination is left to the whim and caprice of the individual prosecutor and thereby violates due process of law.

4. While not necessarily of constitutional dimension, sub-section (3) suffers from another infirmity. The statute prescribes mandatory minimum sentences without parole or other mitigation unless the state attorney initiates a motion to reduce or suspend the sentence. This Court shares the concern of Judge Wachtler expressed in his concurring opinion in People v. Eason,

386 N.E.2d 673 (N.Y. 1976), a case provided to the court by the prosecution. Judge Wachtler states:

> ...I am compelled to express my concern with the prosecutor's unbridled discretion to withhold recommending probation. Regardless of a defendant's actual co-operation, under the present statute the prosecutor may arbitrarily quell the possibility of probation without review of any sort. It is my view that since the Legislature has spelled out the predicate for probationers treatment, i.e., providing material assistance, the prosecutor's determination should not be beyond the neutral eye of the judiciary. This absence of reviewability is especially enigmatic in view of the statute's explicit requirement (in virtually identical language) that in considering whether or not to accept a recommendation the count must believe that the defendant "has or is providing material assistance." And whereas the court may benefit from the prosecutor's participation in or

> recommendations regarding probation, it must be remembered that the prosecutor is in an adversarial posture. Consequently, it would be far more appropriate for this type of discretion to be exercised by the court.

5. The Court finds that sub-section (3) of §893.135, Florida Statutes is not "severable" from the remainder of the statute, notwithstanding the "saving clause" contained in the statute. The mere inclusion of a "saving" or "severability clause" in the Act is not controlling in determining the intent of the Legislature. See State ex rel. Boyd v. Green, 355 So.2d 789 (Fla. 1978); State v. Lee, 356 So.2d 276 (Fla. 1978).

The Court has reviewed the various transcripts reflecting the legislative history of Section 893.135, and determined that the legislature clearly did not intend for Subsection (3) of §893.135 Florida Statutes (relating to relief for Defendants that provide substantial assistance) to be severable from the portions of the Statute imposing severe mandatory sentences. In addition, it was clearly the intent and purpose of the Legislature in drafting this statute that most defendants convicted thereunder would make use of the punitive and unconstitutional "substantial assistance" provision and that the mandatory sentences provided by the remainder of the statute would be, accordingly, applied sparingly. Therefore, once this "substantial assistance" provision is invalidated as being unconstitutional, were the remainder of the statute to remain in force, the impact would drastically exceed the anticipations of the legislature in passing the law. Accordingly the Court specifically finds:

(a) That the statute as a whole would not have been enacted without the inclusion of subsection (3) of §893.135. See High Ridge Management Corp. v. State, 354 So.2d 377 (Fla. 1977); Presbyterian Homes of Synot of Florida v. Wood, 297 So.2d 556, 559 (Fla. 1974); State ex rel. Limpus v. Newell, 85 So.2d 124, 128 (Fla. 1956); State v. Calhoun County, 127 Fla. 304, 311-13, 170 So. 883, 886 (1936).

(b) That without the provisions contained in sub section (3) being given effect, application of the statute would create a result never contemplated by the legislature. See State ex rel. Boyd v. Green, 355 So.2d 789, 795 (Fla. 1978); State ex rel James v. Gerrell, 137 Fla. 324, 330, 188 So. 812, 815 (1939) (on rehearing); Hayes v. Walker, 54 Fla. 163, 168, 44 So. 747, 749 (1907).

(c) That the provisions of the Act contained in sub section (3) were a clear and obvious inducement to the enactment of the other provisions of 893.135, specifically, sub section (1) and (2) thereof. See State ex rel. West v. Helburn, 70 Fla. 55, 61-62 69 So.2d 784, 786 (1915); Dade County v. Keys, 141 So.2d 819, 821-22 (Fla. 3d DCA 1962), cert discharged 152 So.2d 171 (Fla. 1963).

5. In light of the above rulings, it is not necessary for this Court to address all of the points raised by the defendant. The Court feels compelled, however, to address one of those points, and in so doing, the Court hereby holds that Section 893.135(1)(b), which prohibits the sale or possession of cocaine or any mixture containing cocaine, is unconstitutionally overbroad, contrary to

due process of law, and in addition violates the equal protection clause of the Fourteenth Amendment.

In that 893.135(1)(b) prohibits sale or possession of a "mixture" of cocaine and innocuous cutting agents, such as manitol, milk sugar, etc., it may well be that the mixture in a given case would consist of 27.9 grams of lactose, and .1 gram of cocaine. That this result is possible is especially true when it is considered that, according to the arresting officer in this case, the Crime Lab makes no determination of the amount of cocaine in a given mixture. Thus, any chemical detectable amount of cocaine when mixed with 28 grams or more of any innocuous substance, would fall within the purview of this statute. Clearly the Statute, particularly 893.135(1)(b) is overbroad in that it prohibits possession of innocuous substances. See Purifoy v. State, 359 So.2d 446 (Fla. 1978). Further, there is no rational basis for defining cocaine as "any mixture containing cocaine" in that it was stated that quantitative analysis can be made if requested. Thus, the inclusion of the illegal cocaine with extraneous substances not prohibited by law for the purposes of enhancement of the offense constitutes a denial of due process of law.

Finally, in that the statute provides for the identical treatment under the mandatory sentencing provisions of persons possessing 28 grams of pure cocaine and those possessing a mere scintilla of cocaine mixed with 28 grams of a cutting agent, the statute offends equal protection of the laws.

BASED upon all of the foregoing, the Court hereby grants the Defendants motion to dismiss Count II of the Information, and declares Section 893.135, Florida Statutes (1979) to be unconstitutional. DONE AND ORDERED THIS 11th day of October, 1979, at Miami, Florida.

[S] illegible

CIRCUIT COURT JUDGE

STATE OF FLORIDA
COUNTY OF DADE

I HEREBY CERTIFY that this instrument is a true and correct copy as shown by files and records in my office. WITNESS MY HAND and official seal this Oct. illegible, 1979.

RICHARD P. BRINKER

Clerk Circuit Court

By [S] C. Downey D.C.

APPENDIX R

IN THE CIRCUIT COURT OF THE
EIGHTH JUDICIAL CIRCUIT, IN
AND FOR BRADFORD COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

vs.

CHARLES J. DANIEL,
T. C. GREEN, JR.
DANIEL M. ALCANTARO,
JOSEPH D. COZZI and
RICHARD LEE WILLIAMS,
Defendants.

STATE OF FLORIDA,
Plaintiff,

vs.

KENNETH W. DAVIS and
TONY D. ELMORE,
Defendants.

STATE OF FLORIDA,

vs.

RONNIE LEE POUNCY,
ROBERT DAVID ROY and
SCOTT DANIEL PHIPPS,
Defendants.

STATE OF FLORIDA,
Plaintiff,

vs.

MALCOLM SCARBROUGH,
Defendant.

Case No. 80-259-CF Case No. 80-291-CF
Case No. 80-259-CR Case No. 80-386-CF
Case No. 80-335-CF Case No. 80-386-CF

ORDER ON MOTIONS TO DISMISS

The defendants seek dismissal, as a matter of law, of escape charges made against them while inmates at Florida State Prison, which charges allege the inmates were "lawfully" confined and that the "escape(s)" occurred on specified dates from May 29, 1980 through September 27, 1980.

Defendants correctly argue that this Court found conditions at Florida State Prison violative of constitutional provisions in Vann v. Wainwright, (80-230-CA). (In Vann, the prima facie finding of unconstitutional conditions was made by issuance of a Show Cause Order on May 29, 1980 and found to continue to exist in the Order of October 3, 1980. These findings have been upheld by decision of the First District Court of Appeals of February 13, 1980 [copy attached] and the Mandate to this Court is expected March 16, 1981.) The defendants' rationale is that the specific constitutional violation found in Vann was that conditions at Florida State Prison were so violent that same constituted cruel and unusual punishment. Cruel and unusual punishments are expressly prohibited to the states by the 8th Amendment to the United States Constitution and further prohibited in Florida by Article 1, Section 17 of the Constitution of the State of Florida.

These defendants are within the specific class of citizens protected by those provisions of the Constitutions; on the charge date they were suffering the very State action that the Constitutions prohibits since the State alleges they were incarcerated at Florida State Prison by the informations filed herein.

By any reasonable interpretation, to find a State action unconstitutional is the same as finding that action beyond the power of the State to take; an ultra vires action is, by definition, an illegal action. Hence, an unconstitutional State action is an unlawful and illegal action. (In this context, term action includes affirmative actions and inaction or neglect which cause prohibited conditions to exist.)

So then, in the instant cases, the State has charged that the defendants "left" lawful confinement, for which the State seeks the sanction of an adjudication of guilt and the imposition of additional, as opposed to continued incarceration.

May the state allege lawful confinement in these cases?--surely; can the State prove it as a matter of law?--just as surely not.

These defendants have not petitioned for release from their present confinement at Florida State Prison--which this Court would be without authority to direct since they were committed by Courts of equal jurisdiction of this Court, nor have they moved to dismiss based on unsupported allegations on unconstitutional conditions.

Because of the unusual nature of this and the Vann ruling, this Order shall apply only to the instant cases which allege escapes between May 29, 1980 and October 2, 1980; shall not be retrospective in application; shall not apply to any case in which the issue was not raised prior to plea or adjudication; nor shall this Order be considered as precedent by this Court n any category of case except the foregoing.

This Order is entered effective at 5:00 p.m., March 16, 1981 and conditioned upon the issuance of the Mandate in Vann v. Wainwright, as implementing the opinion of the First District Court of Appeals issued February 13, 1981.

DONE AND ORDERED this 10th day of March, 1981 in Chambers at Starke, Bradford County, Florida.

/S/ R. A. Green, Jr.
R. A. GREEN, JR.
CIRCUIT JUDGE

Copies Furnished to:

John Stinson, Esquire
Shon A. Saxon, Esquire
Mack Futch, Esquire
State Attorney
corr:

Motion to
Dismiss
or Affirm

Supreme Court, U.S.
FILED
MAR 29 1982
ALEXANDER L. STEVAS
CLERK

CASE NO. 81-1621

IN THE

Supreme Court of the United States

October Term, 1981

HOWARD MATTHEW BILFORD, EDUARDO GARCELL,
GEORGE LUIS GONZALEZ, FRANK VINCENT
DICAMILLO, ALBERTO ARAUJO, LUIS CARLOS
PEREZ and JEFFREY ELIOT HOWARD,

Appellants,

vs.

THE STATE OF FLORIDA,

Appellee,

ON APPEAL FROM THE
SUPREME COURT OF FLORIDA

APPELLEE'S MOTION TO DISMISS OR AFFIRM

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Attorneys for the Appellee

QUESTION PRESENTED

Whether Section 893.135, Florida Statutes is unconstitutional in that it is violative of the constitutional protections afforded by the Due Process clause; the Equal Protection clause and the prohibition against self-incrimination and cruel and unusual punishment.

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PREFACE

The Appellants were the defendants in the Florida trial court below. The State of Florida was the prosecution below. In this brief, the parties will be referred to as they appeared in the trial court below.

The following references are made in this brief:

(A) For the Appendix to the brief of the Appellants.

I.

OPINIONS BELOW

The opinion of the Florida Supreme Court reversing the trial court's finding that Section 893.135 Florida Statutes is unconstitutional is reported at State v. Thebeau, 405 So.2d 973 (Fla. 1981).

II.

JURISDICTION

The Defendants claim jurisdiction herein based upon 28 U.S.C. 1257(2).

III

ARGUMENT

The State is in receipt of the Defendants' jurisdictional statement on appeal from the Supreme Court of Florida, in which the court reversed the trial court's finding that Section 893.135 Florida Statutes is unconstitutional, citing State v. Benitez, 395 So.2d 514 (Fla. 1981) and/or State v. Yu, 400 So.2d 762 (Fla. 1981). See, also, State v. Werner, 402 So.2d 386 (Fla, 1981). The Defendants now seek a second review in this Court. The Defendants claim that the mandatory penalties under Section 893.135(1) and the provision for mitigation in Section 893.135(3) in the event of a defendant's "substantial assistance" are violative of the constitutional protections afforded by the Due Process clause; the Equal Protection clause and

the prohibition against self-incrimination and cruel and unusual punishment.

A. NON-FINALITY

The present appeal evolves from a circumstance wherein the Florida trial court declared Section 893.135 Florida Statutes unconstitutional in a criminal trial proceeding and thereupon dismissed the charges against the Defendants. The Florida Supreme Court reversed the dismissal and thereby reinstated the charges against the Defendants. There has been neither a trial on the merits nor a conviction of any of the Defendants. Section 1257(2) of 28 U.S.C. limits the jurisdiction of this Court to. "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had...." Where there is neither a trial on the merits nor a conviction and sentence, this Court has no jurisdiction and the cause should be dismissed. See, Flynt v. Ohio, ___U.S.___,101 S.Ct. 1958 (1981);

see, also, Cox Broadcasting Corp v. Cohn, 420 U.S. 469 (1975). The present cause is identical to that presented in Wall v. Florida, U.S.Sup.Ct.Case No. 81-782, appeal dismissed January 11, 1982 and Blalock v. Florida, U.S.Sup.Ct.Case No. 81-712, appeal dismissed January 11, 1982.

B. THE DEFENDANTS HAVE NO STANDING

In the leading decision in State v. Benitez, 395 So.2d 514 (Fla. 1981) upon which these appeals are based, the State had argued that the Defendants had no standing to argue the constitutionality of Section 893.135 Florida Statutes, because the statute was a sentencing statute and the Defendants had not even presented motions to suppress and neither had they been convicted. In rejecting this argument the Florida Supreme Court explained that:

> "The state argues that, because appellees have not yet been convicted, they have no personal stake in this penalty oriented statute.
>
> To state the assertion is to demonstrate its absurdity. A party subject to criminal prosecution clearly has a sufficient personal stake in the penalty which the offense carries. This is wholly unlike cases in which criminal defendants have challenged portions of a statute which have nothing to do with their prosecution. See State v. Millington,

> 77 So.2d 685 (Fla. 1979); *State v. Champe*, 373 So.2d 874 (Fla. 1978)."

395 So.2d at 517.

Recently, in *County Court of Ulster County, New York v. Allen*, ___U.S.___, 99 S.Ct. 2213 (1979), the defendant/petitioner upon a due process claim had sought to overturn New York Penal Law §265.16(3), which provides that the presence of a firearm in a vehicle is presumptive of its possession by the occupants. 99 S.Ct. at 2217. The United States Court of Appeal for the Second Circuit had held that the statute was, "unconstitutional on its face." 568 F.2d 998 at 1009. In reversing the Circuit Court of Appeals, the *Allen* Court again emphasized that:

> "A party has standing to challenge the constitutionality of a statute *only insofar as it has an adverse impact on his own rights*. As a general rule, if there is no constitutional defect in the application of the statute to a litigant, *he does not have standing to argue that it would be unconstitutional if applied to*

> third parties in hypothetical situations. A limited exception has been recognized for statutes that broadly prohibit speech protected by the First Amendment. This exception has been justified by the overriding interest in removing illegal deterrents to the exercise of the right of free speech. That justification, of course, has no application to a statute that enhances the legal risks associated with riding in vehicles containing dangerous weapons." (Emphasis added, citations omitted).
>
> 99 S.Ct. at 2223.

See, California Bankers Association v. Shulty, 416 U.S. 21, at 71-72 (1974). The Allen Court went on to consider the facts and circumstances before it and found that the New York Statute constitutional as applied. 99 S.Ct. at 2226-2230. The sine qua non of any facial attack upon the constitutionality of a statute as in the case at bar, is a requirement that the statute may be violative of the fundamental rights contained in the First Amendment. County Court of Ulster v. Allen, supra; Broaderick v.

Oklahoma, 413 U.S. 601, at 611-612 (1973).

The Defendants' complaints and the fundamental premise of Section 893.135(1) is directed to the sentencing proceedings and thereafter, None of the Defendants have been convicted or sentenced. Given the multiplicity of protections afforded the Defendants in the criminal justice system, including plea bargaining; Motion practice and the right to a trial by jury, the Defendants may never be convicted or sentenced for an offense under Section 893.135. Merely because they have challenged the constitutionality of the statute does not render the issue fundamental and properly susceptible to judicial analysis. County Court of Ulster v. Allen, supra. Sub judice, the Defendants' constitutional complaints are inherently premature and devoid of proper standing. Absent any issue regarding Freedom of Speech, the facial attack upon the constitutional-validity of Section 893.135, must necessarily be rejected. _Id_.

In sum, the Florida Supreme Court in _Benitez_ has improperly conferred jurisdiction upon this Court by its incorrect analysis of the Defendant's standing and the ripeness of the present claims for adjudication. _This Court should accept jurisdiction in order to correct this serious and repetitive error in the Supreme Court of Florida's constitutional analysis_. To do otherwise will only encourage further needless, premature litigation such as that presently before the Court. _See_, _Point "A"_, _supra_.

C. NO SUBSTANTIAL FEDERAL QUESTION

Each of the Defendants' constitutional complaints are easily rejected based upon settled principles of federal constitutional analysis. In Roberts v. United States, ___U.S.___, 100 S.Ct. 1358 (1980) the defendant, a heroin dealer, refused to cooperate with police in further investigation of narcotics traffic in his community. 100 S.Ct. at 1362. The trial court therefore meted out a more severe sentence than if the defendant had cooperated. Id. In sustaining the more severe sentence the Roberts court held, 1) that part of the defendant's rehabilitation would be cooperation with law-enforcement in exposing crime in his community and 2) that there was no record basis for any claim of self-incrimination or coercion. 100 S.Ct. at 1363-1365. As in Roberts, in the case at bar there is not a shred of evidence that the Defendants have been compelled or coerced to do anything. Indeed, under settled principles of constitutional analysis, to infringe upon the Fifth Amendment prohibition, the testimony must be both compelled and used against the defendant. See, Lefkowitz v. Cunningham, 431 U.S. 801, at 804-805 (1977). Without use against the defendant, there is no prohibition under the Fifth Amendment. See, United States v. ManDujano, 340 U.S. 367 (1951). Furthermore, the central issue under the Fifth Amendment is not whether the Defendants have a difficult choice but whether they have a choice. See, McGautha v. California, 402 U.S. 183, at 212-213 (1971); North Carolina v. Alford, 400 U.S. 25 (1970); Brady v. United States, 397 U.S. 742 (1970). The present statute presents the Defendants only with a difficult choice and is therefore not in violation of any constitutional precepts.

The Defendants' claims that Section 893.135 denies due process and the statute imposes cruel and unusual punishment are similarly wholly without merit. In Bordenkircher v. Hayes, 434 U.S. 357 (1978) the prosecutor in pretrial plea bargaining had told the defendant, the defendant's plea to a term of five years in prison would be acceptable, but that if the defendant did not plead guilty, that he, the prosecutor, would seek a grand jury indictment against the defendant as an habitual offender, which required a mandatory life sentence. 434 U.S. at 359. The defendant in Bordenkircher chose not to plead guilty and was subsequently convicted and sentenced to life. Id at 360. In framing the issue, the Bordenkircher court specifically held that:

> "As a practical matter, in short, this case would be no different if the grand jury had indicated Hayes as a recidivist from the outset, *and the prosecutor had offered to drop that charge as part of the plea bargain*." [Emphasis added].
>
> *Id*.

Addressing the principles which are clearly controlling herein, the court further opined that:

> "*By hypothesis, [a] plea may have been induced by promises of a recommendation of a lenient sentence or a reduction of charges, and thus by fear of the possibility of a greater penalty upon conviction after trial*. See ABA Standards Relating to Pleas of Guilty §3.1 (1968); Note, Plea Bargaining and the Transformation of the Criminal Process, 90 Harv.L. Rev. 564 (1977). Cf. Brady v. United States, supra, 397 U.S., at 751, 90 S.Ct. at 1470; North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162.
>
> *While confronting a defendant with the risk of more severe punishment clearly may have a discouraging effect on the defendant's assertion to his trial rights, the imposition of these difficult choices [is] an inevitable--and permissible--attribute of any legitimate system which tolerates and encourages the negotiation of pleas*." [Emphasis added].
>
> *Id*, at 364.

Relying upon its decision in Bordenkircher, in Corbitt v. New Jersey, __U.S.___, 99 S.Ct. 492 (1978), the court also found no constitutional disability in circumstances analogous to those possible under the statute in the case at bar. In Corbitt through a complex New Jersey system of homicide statutes, if the defendant went to trial and was convicted of first degree murder the trial judge must sentence him to life imprisonment. 99 S.Ct. at 495. If the defendant pleaded nolo contendere to the trial court and the trial court accepts his plea he could be sentenced to a sentence of "not more than 30 years" or life in the complete discretion of the trial court. 99 S.Ct. at 495-497. The Corbitt defendant chose to go to trial and was convicted of a first degree murder offense and sentenced to the mandatory life term under the statute. 99 S.Ct. at 495-496.

In rejecting the defendant's multiple constitutional claims under the Fifth, Sixth and Fourteenth Amendments, the Corbitt court held that:

> "As did the New Jersey Supreme Court, we disagree. The cases in this Court since Jackson have clearly established that not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid. Specifically, there is no per se rule against encouraging guilty pleas. We have squarely held that a State may encourage a guilty plea by offering substantial benefits in return for the plea. The plea may obtain for the defendant not only"the possibility or certainty . . . [of] a lesser penalty than the sentence that could be imposed, after a trial and a verdict of guilty . . .," Brady v. United States, 397 U.S. 742, 751, 90 S.Ct. 1463, 1470, 25 L.Ed.2d 747 (1970), but also of a lesser penalty than that required to be imposed after a guilty verdict by a jury."

The Corbitt court concluded its analysis, relying upon Bordenkircher thus:

> "While confronting a defendant with the risk of more severe punishment clearly may have a discouragin effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable'--and permissible--' attribute of any legitimate system which tolerates and encourages the negotiation

of pleas.' Chaffin v. Stynchcombe, supra, at 31 (93 S.Ct. 1977). It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutional legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forego his right to plead not guilty." 434 U.S., at 364, 98 S.Ct., at 668."

99 S.Ct. at 498.

In the case at bar, after their convictions, sentences and appeals, the Defendants have two choices under the statute. They may either serve the lawful term of their imprisonment or they may seek the benefit of mitigation of their sentences by substantial cooperation with the authorities. Under Corbitt, Bordenkircher and Brady and its progeny, there is simply no constitutional disability in merely providing the Defendants with the choice of "grim alternatives" upon their convictions for trafficking in narcotics in Florida.

Trafficking in narcotics is indeed a heinous crime, which is tearing at the very fabric of our society. Clearly the legislative purpose in providing more severe penalties for such a crime has a rational basis and therefore is manifesting devoid of any defect under an equal protection claim. See, analysis in, Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976); Marshall v. United States, 414 U.S. 417, at 421-422 (1974); see also,Albernaz v. United States, ___U.S.___, 101 S.Ct. 1137 (1981). Additionally, the severity of the penalties in Section 893.135 also cannot be seriously assailed under any theory under the Eighth Amendment. See, Rummel v. Estelle, ___ U.S.___, 100 S.Ct. 1133 (1980). The extent and nature of crimes and their punishment is an exclusive legislative perogative into which no court may intrude. Id.

V

CONCLUSION

WHEREFORE, upon the foregoing, the Appellee, THE STATE OF FLORIDA, prays that this Honorable Court will enter its order affirming the judgment below and/or dismissing the Defendants' appeals.

RESPECTFULLY SUBMITTED, on this ___ day of March, 1982, at Tallahassee, Leon County, Florida.

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